SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 756

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION FILM SALES, INC., NATIONAL BROADCASTING COMPANY, INC., CALIFORNIA NATIONAL PRODUCTIONS, INC., LOEW'S INCORPORATED, REPUBLIC PRODUCTIONS, INC., REPUBLIC PICTURES CORPORATION and HOLLYWOOD TELEVISION SERVICE, INC.,

Appellants,

vs.

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE P. CARPENTER, RUSSELL A. CHEEVER, and HARRIET CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

No. 757

RADIO CORPORATION OF AMERICA, COLUMBIA BROADCASTING SYSTEM, INC., CAPITOL RECORDS, INC., LOEW'S INCORPORATED, DECCA RECORDS, INC., and CORAL RECORDS, INC.,

Appellants,

vs.

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER and GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

On Appeal From the Supreme Court of the State of California.

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Appellees.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

These are appeals from final judgments of the Supreme Court of the State of California, entered in two original proceedings before it for writs of mandate, adjudging that under Section 412 of the California Code of Civil Procedure, the Superior Court of the State of California, in and for the County of Los Angeles, has jurisdiction over two actions by appellees against these appellants

and others and ordering said court to assume and exercise jurisdiction over applications by appellees for preliminary injunctions and for appointment of a receiver.*

Opinions Below.

The opinion and decision of the California Supreme Court is reported unofficially at 49 A. C. 339, 316 P. 2d 960, and a copy is appended hereto as Appendix A. The opinion of the District Court of Appeal (which has been superseded by the opinion of the California Supreme Court), will not be officially reported but is reported unofficially at 310 P. 2d 145. The memorandum opinion of the Superior Court for Los Angeles County in related proceedings entitled *Atkinson, et al. v. American Federation of Musicians; et al.*, and *Anderson, et al. v. American Federation of Musicians, et al.*, is unreported, but is appended hereto as Appendix B.

Jurisdiction.

The proceedings below were original proceedings for writs of mandate brought by appellees in the California Supreme Court pursuant to Sections 1084, 1085 and 1086 of the California Code of Civil Procedure (West's Ann. Cal. Codes, Code Civ. Proc., §§1084-1086) and Rule 56 of the California Rules on Appeal (36 Cal. 2d 41). The judgments of the California Supreme Court were entered on November 5, 1957 [App. A], and notices of appeal were filed in that court on December 3, 4 and 13, 1957. The jurisdiction of this Court is invoked under

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*This Jurisdictional Statement is filed on behalf of the appellants named in the caption. The American Federation of Musicians which has also appealed from the judgment below may be expected to file a separate Statement.

28 U. S. C. §1257(2). Cases believed to sustain the jurisdiction are, *e.g.*, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282; *Standard Oil Co. v. Johnson*, 316 U. S. 481, and *Leslie Miller, Inc. v. Arkansas*, 352 U. S. 187, holding that a proper case for appeal is presented where the validity of a state statute, as construed and applied, is drawn in question on the ground of repugnancy to the Federal Constitution; and *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8, 14; *Detroit and M. R. Co. v. Michigan R. Comm'n*, 240 U. S. 564, 570-571, and *Rescue Army v. Municipal Court*, 331 U. S. 549, 566-567, holding that a judgment granting or denying an extraordinary writ is "final" despite the fact that it does not completely determine on the merits the underlying controversy between the parties or preclude further related proceedings between them. See pp. 7-9, *infra*.

Question Presented.

Is Section 412 of the California Code of Civil Procedure repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States when such statute is construed and applied (as it was by the California Supreme Court) to authorize adjudication of the rights of a nonresident over whom it has no personal jurisdiction, in a California action brought against such nonresident, as trustee under a trust agreement and against trustors who were found and personally served in California, for the purpose of having it adjudged that such trust agreement is invalid and that the trustors are obligated to pay to plaintiffs the sums which they agreed to pay to the nonresident trustee and which he agreed to use for specified trust purposes?

Statutes Involved.

Sections 412, 413 and 417 of the California Code of Civil Procedure (Cal. Stat. 1951, ch. 1737, §48, ch. 43, §1, ch. 935, §1, West's Ann. Cal. Codes, Code Civ. Proc., §§412, 413, 417) are set forth in Appendix C hereto.

Statement of Facts.

These are appeals from final judgments of the California Supreme Court entered in two original proceedings before it for writs of mandate. The writs of mandate command the Superior Court for Los Angeles County to assume and exercise jurisdiction over applications by appellees for preliminary injunctions and appointment of a receiver in two actions entitled *Atkinson, et al. v. American Federation of Musicians, et al.* and *Anderson, et al. v. American Federation of Musicians, et al.* The Superior Court for Los Angeles County had refused to entertain appellees' applications on the ground that under the Due Process Clause of the Fourteenth Amendment it had no power to determine the rights of Samuel R. Rosenbaum, an indispensable party, in the absence of jurisdiction over his person.

The actions to which these proceedings for extraordinary writs relate were brought by appellees, on behalf of themselves and other musicians similarly situated, against the American Federation of Musicians, Samuel R. Rosenbaum, and a number of companies, including these appellants, which are engaged in the manufacturing of phonograph records (the *Anderson* case) or the licensing of theatrical motion pictures for use on television (the *Atkinson* case). In both actions it was alleged that the Federation had breached a duty, imposed upon it by

law as exclusive bargaining agent for musicians employed in the motion picture and recording industries, by causing the appellant companies to enter into certain agreements with Rosenbaum rather than to pay appellees additional amounts in the form of wages. The disputed agreements obligated appellants to pay large sums of money to Rosenbaum, as trustee, and obligated Rosenbaum to use such sums for the purpose of arranging and organizing free public performances by instrumental musicians in a manner calculated to contribute to public knowledge and appreciation of music. In both actions, the relief demanded is an adjudication that the agreements between appellants and Rosenbaum are invalid; that Rosenbaum has no interest in the payments described therein; and that the companies are obligated to pay appellees the amounts which they had agreed to pay Rosenbaum, as trustee, free of any obligation on the part of appellees to use the amounts for the specified purposes. Pending such an adjudication, each group of appellees sought an injunction forbidding the making of payments to the trustee, and the appointment of a receiver to collect and hold such payments.

Samuel R. Rosenbaum, a resident of New York, did not appear and was not personally served within the State of California. He was, however, served constructively under color of the authority granted in §412 of the California Code of Civil Procedure by delivery of a summons and copy of the complaint to him in New York. These appellants, who were personally served within the state, appeared in opposition to appellees' demands for a preliminary injunction and contended, *inter alia*, that Rosenbaum was an indispensable party to such actions;

that assumption by the court of jurisdiction to determine the rights of Rosenbaum and these appellants without personal jurisdiction over Rosenbaum would constitute a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States; that if §412 of the Code of Civil Procedure should be construed to authorize such an assumption of jurisdiction it would be repugnant to the Fourteenth Amendment, and that the application should therefore be denied. In a memorandum opinion filed January 24, 1957 [App. B], the Superior Court for Los Angeles County indicated that it was prepared to sustain these appellants' contentions as to lack of jurisdiction and would issue an order denying appellees' applications.

Thereafter, appellees brought two proceedings in the appropriate California District Court of Appeal entitled *Atkinson, et al. v. Superior Court* and *Anderson, et al. v. Superior Court* for writs of mandate to compel the Superior Court for Los Angeles County to assume and exercise jurisdiction over their applications for preliminary injunctions and the appointment of a receiver. In accordance with Rule 56 of the California Rules on Appeal, the petitions for writs of mandate were served upon these appellants as real parties in interest. These appellants made returns by filing demurrers and in support thereof made the above stated contentions based on the Fourteenth Amendment. The District Court of Appeal rejected these contentions and gave judgment for appellees. 310 P. 2d 145. Subsequently, however, the California Supreme Court granted appellants' petition for hearing, a step which under California practice had the effect of vacating the opinion and judgment rendered in the

District Court of Appeal.* The proceedings in the California Supreme Court which followed were, therefore, in the nature of original proceedings brought by appellees rather than proceedings brought by appellants to secure appellate review of the adverse judgment of the District Court of Appeal.

In the California Supreme Court, appellants repeated the contentions set forth above, tendering for decision by their briefs and oral argument the issue, among others, of whether Section 412 of the California Code of Civil Procedure was repugnant to the Fourteenth Amendment if construed and applied to authorize assumption and exercise of jurisdiction over Rosenbaum and these appellants in the basic actions. By its judgments filed November 5, 1957, the court decided this issue adversely to appellants [App. A]. Thereafter it issued a writ of mandate in each case [App. D]. Appellants appealed to this Court by their notices of appeal filed December 3, 4 and 13, 1957.

This Court Has Jurisdiction of the Appeals.

A. The Federal Question Was Raised and Decided.

The validity of Section 412, California Code of Civil Procedure, as construed and applied, was "drawn in question" in the proceedings below not only by appellants but by the California Supreme Court. In its opinion, the court stated the issue before it as follows [App. A, pp. 4-5]:

> "Code of Civil Procedure Section 412 provides: 'Where the person on whom service is to be made

*See *Knouse v. Nimocks*, 8 Cal. 2d 482, 483-484, 66 P.2d 438, 438-439; *People v. Woods*, 19 Cal. App. 2d 556, 560, 65 P. 2d 940, 942.

> resides out of the State . . . and it . . . appears . . . that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant . . . has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person . . . from any interest therein, such court, or judge, may make an order that the service be made by the publication of the summons.' Section 413 provides that personal service outside the state is equivalent to publication. Plaintiffs claim that the employers' obligation to make the payments involved is one owing to them instead of to the trustee. That obligation is a chose in action. . . . The question presented, therefore, is whether the chose in action in question may be treated as being within this state within the meaning of section 412 for purposes of exercising in rem or quasi in rem jurisdiction over it in these actions."

The court then held that Section 412 was applicable in the circumstances before it, reviewed at length the decisions of this Court relating to the jurisdiction allowable to state courts under the Fourteenth Amendment, and decided in favor of the validity of Section 412 as thus applied [App. A]. Under the circumstances, it is clear that the decision below is reviewable by appeal under 28 U. S. C. §1257(2). See *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282; *May v. Anderson*, 345 U. S. 528; *Leslie Miller, Inc. v. Arkansas*, 352 U. S. 187.

B. The Judgments Below Were "Final" Within the Meaning of 28 U.S.C. Section 1257.

In *Rescue Army v. Municipal Court,* 331 U. S. 549, 565-566, this Court followed and confirmed a line of decisions extending over more than a century in holding that proceedings to obtain extraordinary writs are separate and distinct from the actions to which they relate, and that judgments entered in such proceedings are "final" regardless of whether further litigation in such other actions is contemplated. See *Weston v. Charleston,* 2 Pet. 448, 464; *Bandini Petroleum Co. v. Superior Court,* 284 U. S. 8, 14; *Detroit and M. R. Co. v. Michigan R. R. Comm'n,* 240 U. S. 564, 570-571. In the *Rescue Army* case, the Court went on to conclude for other reasons that its appellate jurisdiction should not be exercised in the circumstances there present. Because substantive constitutional issues of great scope and difficulty were involved; because the issues were posed abstractly, without any factual basis of record; and because it was not possible to determine with precision what issues were necessarily presented for decision, the Court concluded that the judgment lacked an element of ripeness requisite to Supreme Court review. The cases at bar, however, present no such obstacles to effective review. The legal issue presented for decision is narrow and unambiguous, and will not be clarified in any respect whatever by further litigation that may ensue between the parties to these appeals. All facts relevant to decision appear of record. Accordingly, under *Rescue Army* as well as the decisions there reviewed and confirmed, the judgments below are "final" and these appeals fall squarely within the obligatory jurisdiction of this Court.

C. Appellants Have Standing to Raise the Question Presented.

The question presented on these appeals is whether, under the Due Process Clause of the Fourteenth Amendment, Section 412 of the California Code of Civil Procedure is unconstitutional as applied in these cases. If Section 412 is unconstitutional, Rosenbaum, the defendant trustee, is not before the California court in the basic actions. In the absence of jurisdiction to determine Rosenbaum's rights, a judgment of the California court requiring these appellants to make the contractual payments to appellees rather than to Rosenbaum would not be entitled to full faith and credit in the courts of other states. See *New York Life Ins. Co. v. Dunlevy*, 241 U. S. 518. Such a judgment would not, therefore, protect these appellants against being compelled to pay the same obligation a second time under a judgment in an action in another state, brought by Rosenbaum, that he, rather than appellees, was entitled to receive the contractual payments from these appellants.

Under state law, Rosenbaum is an indispensable party to the basic actions so far as any relief against these appellants is concerned, and without first having obtained jurisdiction over Rosenbaum the California court has no jurisdiction to proceed against these appellants.* Moreover, as a matter of federal constitutional law, Rosenbaum

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*See, generally, *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal. 2d 232, 73 P. 2d 1163; *Bank of California v. Superior Court*, 16 Cal. 2d 516, 522, 106 P. 2d 879, 883-884; *Younger v. Jordan*, 42 Cal. 2d 757, 269 P. 2d 616; *Willis v. Lauridson*, 161 Cal. 106, 117, 118 Pac. 530; and the memorandum of the Superior Court for Los Angeles County in the basic actions [App. B].

is an indispensable party so far as any relief against these appellants is concerned, for to allow the California court to compel payment by appellants under a judgment not entitled to full faith and credit elsewhere would constitute a denial of due process of law in violation of the Fourteenth Amendment.* See *Standard Oil Co. v. New Jersey,* 341 U. S. 428, 431.

Under the circumstances presented here, a decision as to the constitutionality of Section 412 of the California Code of Civil Procedure will necessarily be dispositive of the rights of appellants in these proceedings, and appellants therefore have standing to prosecute these appeals. *Cf. Pierce v. Society of Sisters,* 268 U. S. 510; *Hitchman Coal & Coke Co. v. Mitchell,* 245 U. S. 229; *Truax v. Raich,* 239 U. S. 33.

D. The Appeals Are Not Moot.

Suggestions of possible mootness may be made in these cases by reason of the following events which have occurred since the entry of the judgments below: (1) In obedience to the judgments from which these appeals are taken, which have not been stayed, the Superior Court for Los Angeles County has entertained the applications for preliminary injunctions and appointment of a receiver to which these proceedings for extraordinary writs relate; and (2) the trial court has denied appellees' application for preliminary relief in one of the two cases (*Atkinson,*

*Under such cases as *Siler v. Louisville & N. R. Co.,* 213 U. S. 175, this Court need not consider whether Rosenbaum is an indispensable party to these proceedings as a matter of federal constitutional law, since state law furnishes adequate support for that conclusion. The jurisdiction of this Court is not affected if the existence of the right for which constitutional protection is claimed depends upon state law. *Fox River Paper Co. v. Railroad Commission,* 274 U. S. 651, 654.

et al. v. American Federation of Musicians, et al.), and granted it in the other (*Anderson, et al. v. American Federation of Musicians, et al.*). Appellants believe, however, that no substantial problem of mootness is presented.

The only basis for a suggestion of mootness would be the familiar rule that an appeal is moot when the act which is sought to be compelled or prevented has already occurred. See *Brownlow v. Schwartz,* 261 U. S. 216; *Richardson v. McChesney,* 218 U. S. 487; *Shub v. Simpson,* 340 U. S. 861, 340 U. S. 881; Stern & Gressman, Supreme Court Practice, pp. 208, 362 (2d ed. 1954). That rule applies, however, only when the act involved has been completely and "irretrievably" performed and "the nature of the case is such that reversal by the Supreme Court could have no effect." *Ibid.*; see *Porter v. Lee,* 328 U. S. 246, 251; *O'Hara v. MacConnell,* 93 U. S. 150, 154. In neither of the cases at bar has the trial court "completely" or "irretrievably" exercised its purported jurisdiction to grant or deny preliminary injunctive relief to appellees pursuant to the judgments from which these appeals are taken. In the *Atkinson* case, the trial court has denied plaintiffs' application for preliminary relief, but continues to have the power and duty to grant it in the event plaintiffs should be successful on any appeal which they may take from the court's order denying such relief or in the event plaintiffs should make an appropriate showing upon another application filed before a final judgment on the merits is rendered. In the *Anderson* case, preliminary relief has actually been granted, and the trial court has expressly retained jurisdiction with a view to dissolving its order in the event that this Court should reverse the judgment below. Under the circumstances, it is clear that a decision by

this Court would have an immediate and decisive effect upon the subject matter of this appeal, and therefore that the appeal is not moot. *Cf. Porter v. Lee, supra; Dakota County v. Glidden,* 113 U. S. 222, 224.

Moreover, the judgments below adjudicate more than the narrow issue of whether the Superior Court for Los Angeles County has jurisdiction to entertain applications for preliminary relief. They adjudge that Section 412 of the California Code of Civil Procedure is constitutional as applied in the basic actions, and hence that the Superior Court has jurisdiction in all respects to adjudicate the rights of Rosenbaum and these appellants.

In these circumstances, the appeals herein will not become moot at least until a final judgment is entered in the basic actions,* *cf. Sterling v. Constantin,* 287 U. S. 378, 386, and probably not then. See *Male v. Atchison, T. & S. F. R. Co.,* 240 U. S. 97; *Rio Grande Western R. Co. v. Stringham,* 239 U. S. 44.

In the event that this Court should conclude that either of these appeals is moot, it should vacate the appropriate judgment below and remand the cause to the California Supreme Court for further proceedings. *Natural Milk Producers v. San Francisco,* 317 U. S. 423; *Riley v. International Brotherhood of Teamsters,* 336 U. S. 930; compare *United States v. Munsingwear,* 340 U. S. 36,

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*Should this Court note probable jurisdiction, the Superior Court for Los Angeles County will undoubtedly refrain from entering a final judgment pending this Court's disposition of these appeals. If necessary, an application to stay entry of final judgment will be made in the California Supreme Court, and, if it should be denied, then in this Court. It is not expected that any decision on the merits will be reached by the trial court before this Court acts upon this Statement and any motion to dismiss or affirm that may be filed.

39. We believe it is clear, however, that neither appeal is moot. Accordingly, all the requisites of appellate jurisdiction under 28 U. S. C. §1257(2) are present and a decision on the merits is required of this Court in both cases.*

The Federal Question Is Substantial.

Since *Pennoyer v. Neff*, 95 U. S. 714, this Court has consistently held that state court judgments are void under the Due Process Clause of the Fourteenth Amendment if rendered without jurisdiction over either the person or the property of the defendant. In the recent case of *McGee v. International Life Ins. Co.*, 355 U. S. — (No. 50, O.T. 1957), this Court redefined the limitations imposed by the Due Process Clause on the power of state

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*Out of an abundance of caution, appellants wish to state their views as to the appropriate course of action for this Court in the event of a decision by it that these appeals are improvidently taken.

Should this Court dismiss these appeals as improvidently taken and then deny certiorari pursuant to 28 U. S. C. §2103, thus allowing the judgments below to become final, the California courts may hold that further consideration of the constitutional issue in the basic actions is precluded by the doctrine of *res judicata*. There is some indication that review by this Court of the constitutional issue could not then be had because of the existence of an adequate state ground for the decision below. *Cf. Rio Grande Western R. Co. v. Stringham*, 239 U. S. 44. But in the absence of a decision on the merits by this Court, Rosenbaum would still be free to contend in New York (in an action which he has already commenced for a declaratory judgment against appellants and the class represented by appellees) that any final judgment in California which may be rendered in favor of appellees is void for lack of jurisdiction over him. Should he prevail, appellants would be compelled to pay twice an amount for which they can be justly liable but once. Accordingly, if this Court should be disposed to dismiss the appeals, it is requested that the Court either (1) grant a writ of certiorari pursuant to 28 U. S. C. §2103; or (2) continue these cases on the docket pending disposition of the basic actions (*cf. Land v. Dollar*, 341 U. S. 737); or (3) deny the writ "without prejudice" to further consideration of the constitutional issue if raised in subsequent proceedings.

courts to exercise *personal* jurisdiction without service of process within their boundaries. In the cases at bar, however, as the court below noted in its opinion [App. A, p. 9], it is beyond dispute that jurisdiction over the *person* of Samuel R. Rosenbaum, an indispensable party, is lacking under the statutes of California.* The sole issue in these cases, therefore, is whether California has such jurisdiction over Rosenbaum's *property* as to justify an assertion of power to adjudicate his rights therein.

It is entirely clear that state courts have jurisdiction to determine the rights of absent parties in any *tangible* property which is physically located within the state. The "property" in question in this case, however, is *intangible* property having no physical existence and hence no location. In cases involving intangible property, this Court has long held that where a debtor owes money to an absent creditor and where a court has personal jurisdiction over the debtor, such court may, through procedures such as garnishment and escheat, adjudicate plaintiff's rights against the absent creditor to the extent of the indebtedness. See *e.g., Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710; *Harris v. Balk*, 198 U. S. 215; *Pennington v. Fourth National Bank*, 243 U. S. 269; *Security Savings Bank v. California*, 263 U. S. 282; *Standard Oil Co. v. New Jersey*, 341 U. S. 428. The rationale of such cases is that a plaintiff garnishor or escheat claimant who can secure jurisdiction over the person of a party who is obligated to the absent defendant, and thereafter can reduce the intangible property to possession by compelling payment on behalf of the

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*See Section 417 of the California Code of Civil Procedure, reprinted in Appendix C, *infra*.

absent defendant, can then proceed to assert his claims against that defendant as if he had in the first instance attached that defendant's tangible property within the state. Under such procedures, a state court can validly adjudicate the rights of the defendant although it has no jurisdiction whatever over his person, and the decision will be conclusive to the extent of his interest in the property garnisheed or escheated.

Although appellees in these proceedings have relied in all the courts below on the above cited cases, the slightest inspection of them shows that they are not in point. They hold that jurisdiction to determine the rights of a defendant over whom a state court has no personal jurisdiction can be secured *if* the local plaintiff alleges and proves that the absent party has a valid, recoverable claim against a party who is personally before the court, and hence has "property" within the state which can be subjected to local claims. The appellees in the cases at bar allege the opposite: that Rosenbaum, the absent defendant, has no rights whatever in the intangible property involved and hence has no property within the state on which a judgment can operate. The purpose of their action is to secure an adjudication that appellants are *not* indebted to Rosenbaum, but are, instead, indebted to them. As the court below said, "Plaintiffs claim that the employers' obligation to make the payments involved is one owing to them *instead of* to the trustee." (Emphasis supplied) [App. A, p. 5.]

The decision of the court below that Section 412 of the California Code of Civil Procedure is constitutional as applied, and hence that appellees' actions can be maintained, is not only without support in the relevant per-

missive decisions of this Court but is squarely in conflict with the decisions in *New York Life Ins. Co. v. Dunlevy,* 241 U. S. 518; *Bank of Jasper v. First National Bank,* 258 U. S. 112; *Estin v. Estin,* 334 U. S. 541, and *Vanderbilt v. Vanderbilt,* 354 U. S. 416. In each of these four cases, a state court had jurisdiction over the person of an alleged debtor. In each, jurisdiction over the person of the defendant creditor was lacking. In each, the relief sought by the party attempting to sustain the jurisdiction was an adjudication that the absent creditor had no rights in the intangible property in question. In all four cases this Court held squarely that a judgment purporting to establish that an absent party has no intangible property rights against an alleged debtor is necessarily personal in character, and hence is void under the Fourteenth Amendment in the absence of personal jurisdiction over the absent party.

The grounds on which the court below sought to distinguish the cases cited are untenable. The *Dunlevy, Estin* and *Vanderbilt* cases were distinguishable, it said, because in each the proceedings were instituted by the debtor in a forum of his own choice rather than by a party asserting a claim to the debt. This assertion is inaccurate as to the *Dunlevy* case, for there, local creditors of the absent party, Mrs. Dunlevy, caused a garnishment to be levied upon the basis of which a rule to show cause was issued against the insurance company and the two insurance policy claimants—Mrs. Dunlevy and a Mr. Gould—for the purpose of having adjudicated the ownership of the policy. In response to the rule to show cause, the insurance company filed its bill of interpleader. See *New York Life Ins. Co. v. Dunlevy,* 214 Fed. 1, 5-6 (9th Cir.). Therefore, the forum was chosen not by the debtor but by Mrs. Dunlevy's

creditors.* Moreover, in each of the three cases it is clear that the identity of the party initiating the suit was deemed irrelevant, and that the effect of the judgment sought on the absent party was deemed decisive. See particularly *Estin v. Estin, supra,* 334 U. S., at 548. It can make no conceivable difference whether proceedings against an absent defendant are instituted by an adverse claimant, as in *Bank of Jasper*** and the cases at bar; by a stakeholder, as the court below thought was the case in *Dunlevy;* or by the debtor, as in *Estin* and *Vanderbilt.* In any such case the proceeding is instituted by a party who is either hostile or indifferent to the absent party's rights and would not be likely to consult him in choosing a forum.

The court below sought to distinguish *Bank of Jasper v. First National Bank,* 258 U. S. 112, on the ground that there a negotiable instrument was involved. The reading of

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*The opinion of the court below also appears to suggest that the *Dunlevy* decision rested on state grounds [App. A, p. 6]. However, the *Dunlevy* opinion indicates beyond all question that the reference to state law went to an altogether different problem, *i.e.,* whether the Pennsylvania court in the garnishment-interpleader proceedings had jurisdiction over the *person* of Mrs. Dunlevy by virtue of the fact that she had been personally served in a prior action by which the garnishors had reduced their original claim against her to judgment. This Court rejected the claim of *personal* jurisdiction because, as here, it was not supported by the applicable state law. The reference to state law thus had nothing to do with this Court's rejection of the claim of jurisdiction based on *property,* which is in issue on these appeals.

**The *Bank of Jasper* case seems to us identical with the case at bar. There, one Corbett, and others similarly situated, had brought actions in Florida against the Bank of Jasper and three Georgia corporations. Process was served upon the Bank of Jasper in Florida but the three Georgia corporations could not be found within the state and hence were served by publication only. Corbett alleged that he had been fraudulently induced by two of the Georgia corporations, Rome Company and American Company, to purchase shares of their worthless stock; that they had deposited the proceeds in the Bank of Jasper, which had issued negotiable

the decision is clearly erroneous. See Stumberg, Conflict of Laws, p. 110, note 42. This Court noted the negotiable character of the obligation involved in *Bank of Jasper* only to indicate why the plaintiff-claimant had not attempted to assert the absent claimant's rights in the manner permitted by such cases as *Harris v. Balk* and *Pennington v. Fourth National Bank, supra.* In *Bank of Jasper,* the plaintiff could not frame his case in terms of an assertion of the absent claimant's rights because he did not have possession

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certificates of deposit therefor; and that the certificates had been negotiated by the two Georgia corporations to the third Georgia corporation, the First National Bank. The complaint prayed that the proceeds of the stock sales, which had been deposited in the Bank of Jasper, "be impressed with a trust in favor of the complainant; that the First National Bank [the holder of the certificates of deposit] be declared not to have any interest therein; that the certificate of deposit . . . and the contract to purchase the stock, be declared void; . . . [and] that the Jasper bank be restrained from making any payment to the First National Bank out of the proceeds. . . ." 258 U. S., at 115-116. The Florida court rejected the contention of the First National Bank, made upon special appearance, that the substituted service of process upon it was invalid, and entered judgment in favor of Corbett as prayed in the complaint.

Thereafter, the First National Bank brought suit on the certificates of deposit against the Bank of Jasper in a federal court, contending that the Florida judgment was invalid for lack of jurisdiction over its person or property. This Court, in an opinion written by Mr. Justice Brandeis, held that the indebtedness of the Bank of Jasper to the First National Bank could not be considered property within the state for purposes of supporting jurisdiction to determine the rights of the First National Bank, for the obvious reason that Corbett, the claimant, had asked the Florida court to determine that the indebtedness in Florida was *not* its property. Had the indebtedness "rested in open account," the court commented, it

> ". . . would have been property of the creditor within the State of Florida. In an *appropriate proceeding* it might have been reached to satisfy a claim against its owner. *Pennington v. Fourth National Bank,* 243 U. S. 269. But the suits in the state court were not proceedings of that character. *In them the complainant asserted that, by reason of the fraud alleged, the Jasper bank was indebted not to any of its correspondents, but to the complainant.*" 258 U. S., at 119 (emphasis supplied).

of the negotiable instrument, a prerequisite to recovery under the applicable common law. Here, appellees cannot frame their case in terms of an assertion of the absent claimant's rights because, under the applicable state law, assertion of his rights would require acceptance of his obligation as a trustee to use the amounts involved for the purposes set forth in the trust agreements. See, *e.g.*, *The First National Bank v. Reed,* 198 Cal. 252, 244 Pac. 368; *Liberty Bank v. Nonnenmann,* 96 Cal. App. 478, 274 Pac. 568; *Patterson v. Crowell,* 15 Cal. App. 105, 113 Pac. 700. Since appellees are not qualified to act as trustees and in any event do not seek to exercise a trustee's rights, they do not and cannot frame their case in terms of an assertion of the rights of the absent party. They demand, and must demand, a purely personal judgment against him.

As noted above, appellees cannot obtain a *personal* judgment in California against Rosenbaum. The California Supreme Court held that "since the trustee is not and has not been a resident of California, section 417 of the Code of Civil Procedure precludes the entry of a personal judgment against him." [App. A, p. 9.] Since the California courts are without power to enter a personal judgment against Rosenbaum, the question of whether there were sufficient "relevant contacts" to support personal jurisdiction under *McGee v. International Life Ins. Co.,* 355 U. S. — (No. 50, O.T. 1957), is not presented.

The California Supreme Court, however, holds that if an absent defendant has "contacts" with the state with respect to a contract right against a local debtor, the state has power, without personal jurisdiction over such defendant, to cancel or invalidate his contract right. But under the decisions of this Court, where there is no personal jurisdiction over a defendant-creditor, a state

court is without power to set aside his rights in intangibles. To hold that such power can be predicated upon "contacts" is inconsistent with the *Dunlevy, Bank of Jasper, Estin* and *Vanderbilt* cases. In each of those cases, this Court struck down the jurisdiction of state courts despite the existence of far more "relevant" contacts with the absent defendant than exist here. In the *Dunlevy* case, the insurance policy was issued to the insured in Pennsylvania, the state which sought to exercise jurisdiction. The insured, in Pennsylvania, assigned his rights in the policy to the absent defendant—Mrs. Dunlevy—at a time when she was a resident of Pennsylvania. See *Dunlevy v. New York Life Ins. Co.*, 204 Fed. 670, 671 (N.D. Cal.). In the *Bank of Jasper* case, the intangible was closely identified with Florida, the state whose courts had attempted to base jurisdiction upon it. The obligation of the Bank of Jasper, the debtor over whom the court had personal jurisdiction, was incurred in Florida and the rights which the complainant was seeking to enforce arose out of a fraud allegedly committed in that state by two of the absent parties. The rights of the third absent party depended upon a certificate of deposit issued in Florida by the Bank of Jasper. In the *Estin* and *Vanderbilt* cases, the "debtor" was domiciled in the forum state, and that state therefore had power to dissolve the very relationship on which the obligation was founded. In all four cases, however, this Court held that the attempted exercise of jurisdiction was improper. The conclusion thus is clear that the decision of the court below is in conflict, both in result and in principle, with decisions of this Court that have been reaffirmed and applied as recently as the 1956 Term.

Under the decisions of this Court, the Due Process Clause of the Fourteenth Amendment precludes a state court from adjudging that a defendant, over whom the

state court has not obtained personal jurisdiction, has no interest in an intangible. The court below has held that the courts of California can constitutionally do the very thing that this Court has held that they cannot constitutionally do—it has held that without having personal jurisdiction over Rosenbaum, the California courts have jurisdiction to adjudge invalid a trust agreement between Rosenbaum and these appellants and to order these appellants to pay to appellees the sums they agreed to pay to Rosenbaum.

Conclusion.

These appeals present a substantial federal question. The *Dunlevy, Bank of Jasper, Estin* and *Vanderbilt* cases have not been overruled and are by no means obsolete. Yet the court below, after suggesting some distinctions that do not exist and others that are immaterial, intimated that the *Dunlevy* case was no longer controlling, blandly asserting that it was "not required to forecast the overruling of the Dunlevy case." [App. A, p. 12.] We believe that the California Supreme Court erred in failing to acknowledge the binding effect of this Court's decisions.

The constitutional question presented herein is obviously of general importance, because the principles established by the *Dunlevy, Bank of Jasper, Estin* and *Vanderbilt* cases now form the basis of statutes and case law relating to jurisdiction in many states. In addition, an authoritative decision by this Court on these appeals is of particular importance to these appellants. The decision below holds that California has power to render judgments requiring appellants to pay money to appellees rather than to Rosenbaum, as trustee. The decision is not, however, binding on the courts of New

York, in which Rosenbaum has already commenced an action against these appellants. The New York courts can be expected to adhere to the principles of *Dunlevy, Bank of Jasper, Estin* and *Vanderbilt*, and in reliance upon those cases to treat any California decision as a nullity. The result then can be that appellants will be required to pay twice—once to appellees as may be required by a California judgment, and once to Rosenbaum as may be required by a New York judgment.

The decision below is final as to appellants, and the issue presented by these appeals should be decided now by a Court whose decisions are binding on the courts of both New York and California.

Respectfully submitted,

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Dated January 29, 1958.

APPENDIX A.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, in Bank.

William (Bill) Atkinson, Jack Barsby, Alfred E. Brain, Clarence (Pete) Carpenter, Russell A. Cheever, Harriet Crawford, individually and on behalf of all other instrumental musicians similarly situated, Petitioners, vs. The Superior Court of the State of California, in and for the County of Los Angeles, Respondent. American Federation of Musicians, Columbia Broadcasting System, *et al.*, and Loews Incorporated, Republic Pictures, *et al.*, Real Parties in Interest. L. A. 24629.

John H. Anderson, Jr., Burnett F. Atkinson, Robert Bain, Edwin Vance Beach, Roland E. Bundock, Lawrence B. Bunker, George Callender, individually and on behalf of all other instrumental musicians similarly situated, Petitioners, vs. The Superior Court of the State of California, in and for the County of Los Angeles, Respondent. American Federation of Musicians, Columbia Broadcasting System, *et al.*, and Loews Incorporated, Republic Pictures, *et al.*, Real Parties in Interest. L. A. 24630.

Filed: Nov. 5, 1957.

Separate class actions were brought by two groups of musicians attacking the validity of collective bargaining contracts between their employers and the American Federation of Musicians and certain trust agreements related thereto. One action is on behalf of the employees of various motion picture companies and the other is on behalf of the employees of various phonograph record com-

panies. The gist of plaintiffs' complaints is that in violation of its duty as their collective bargaining agent and in fraud of their rights the Federation contracted with the employers that certain royalty payments and payments for reuse of motion pictures on television should be paid to a trustee for specified trust purposes instead of to the employees.

Plaintiffs allege that these payments constitute wages earned by the employees and that their diversion to the trust is violative of their rights; that the purpose of the trust is to contribute to the public knowledge and appreciation of music throughout the United States and Canada, and the trustee is authorized and directed to expend the trust funds in presenting personal performances by instrumental musicians to which the public is admitted without charge; that the trust arrangement diverts wages earned by California employees, members of Local No. 47, for the benefit of Federation members elsewhere without corresponding benefit to plaintiffs from the operation of similar arrangements made elsewhere; that the employers are willing to make the payments to their employees, but for their agreements with the Federation to make the payments to the trustee; and that the national executive officers of the Federation insisted on this arrangement for the selfish purpose of perpetuating themselves in office and of maintaining their hold and control over the affairs of the Federation and used the trust fund to win the support of officials of the Federation's locals and member musicians throughout the United States and Canada, who vastly outnumber plaintiffs and are not employed by the employers here involved.

In each action, the Federation, the trustee, and the respective employers are named as defendants. Plain-

tiffs seek a declaration of the invalidity of the collective bargaining agreement and their right to the payments either as beneficiaries of a constructive trust or on the ground that the payments constitute wages withheld in violation of sections 222 and 224 of the Labor Code. They also seek damages against the Federation for breach of its duty to them. At the commencement of the actions they moved for the appointment of a receiver to collect the payments and preliminary injunctions to prevent the employers from making the payments to the trustee. The employers have been personally served with process in this state, and personal jurisdiction has been obtained over the Federation. The trustee was served pursuant to court order by delivery of summonses and complaints and motion papers within the State of New York, but he has not appeared.

The trial court held that insofar as plaintiffs sought to intercept the delivery of payments to the trustee by the appointment of a receiver and temporary injunctions, the trustee was an indispensable party and that the court had no jurisdiction to grant plaintiffs' motions for provisional relief without personal jurisdiction over the trustee. It was careful to point out that its ruling was based solely on lack of jurisdiction and stated that "if the court had jurisdiction to do so, the exercise of a sound discretion would probably require the granting of a preliminary injunction and perhaps the appointment of a receiver . . ."

Some of the plaintiffs in each of the actions then filed their petitions for writs of mandate in the District Court of Appeal, Second Appellate District. The Second Division of that court issued alternative writs of mandate and after a hearing filed its decision in each case "com-

manding respondent superior court to assume and exercise jurisdiction over petitioners' application for preliminary injunction and appointment of receiver as prayed herein." Petitions for hearing by the real parties in interest, the defendant employers and Federation, were then granted by this court.

The writ of mandate is an appropriate remedy unless an appeal from each order denying the motion for a preliminary injunction constitutes "a plain, speedy, and adequate remedy." (Code Civ. Proc., § 1086; Financial Indem. Co. v. Superior Court, 45 Cal. 2d 395, 399.) Petitioners alleged in their petitions before the District Court that the remedy by appeal was not adequate because of the necessity of prompt action to prevent further movement of funds out of the jurisdiction of the superior court. Since no purpose but delay would be served at this time by reviewing the District Court's decision that the remedy by appeal was inadequate, we accept it for the purposes of these proceedings. (Bowles v. Superior Court, 44 Cal. 2d 574, 582.)

We have concluded that personal service upon the trustee in New York was sufficient to give the court jurisdiction to adjudicate his right to receive payments under the contracts here involved. Code of Civil Procedure section 412 provides: "Where the person on whom service is to be made resides out of the State . . . and it . . . appears . . . that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant . . . has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consist wholly or in part in excluding such person . . . from any interest therein, such court, or judge, may make an order

that the service be made by the publication of the summons." Section 413 provides that personal service outside the state is equivalent to publication. Plaintiffs claim that the employers' obligation to make the payments involved is one owing to them instead of to the trustee. That obligation is a chose in action and is therefore personal property within the meaning of the statutory provisions. (Code Civ. Proc., § 17 (3).) Being an intangible, it has no situs in fact. "An intangible, unlike real or tangible personal property, has no physical characteristics that would serve as a basis for assigning it to a particular locality. The location assigned to it depends on what action is to be taken with reference to it." (Estate of Waits, 23 Cal. 2d 676, 680.) The question presented, therefore, is whether the chose in action in question may be treated as being within this state within the meaning of section 412 for purposes of exercising in rem or quasi in rem jurisdiction over it in these actions.

Plaintiffs rely on cases holding that having jurisdiction over the obligor, the state has power to enforce the obligation and cut off the right, if any, of a nonresident claimant thereto without personal jurisdiction over the nonresident. Garnishment proceedings (Harris v. Balk, 198 U. S. 215) and escheat proceedings (Standard Oil Co. v. New Jersey, 341 U. S. 428; Security Bank v. California, 263 U. S. 282) are examples of the exercise of such power. Defendants contend, however, that in the case of ordinary choses in action such power is limited to situations in which the local claimant admits the validity of the local debtor's obligation to the nonresident and seeks to reach the interest he admits is the property of the nonresident. They point out that in the present case plaintiffs are not seeking to reach property

admittedly belonging to the trustee but are claiming that the obligation is owed only to them. Defendants rely on cases holding that the debtor cannot treat his own obligation as property where he is, when his purpose is to terminate a nonresident's claim against him (Vanderbilt v. Vanderbilt, 77 Sup. Ct. 1360; Estin v. Estin, 334 U. S. 541); and they contend that the rule is the same when the debtor seeks to interplead both a local and a nonresident claimant. (N. Y. Life Ins. Co. v. Dunlevy, 241 U. S. 518.) In their view it is immaterial in an action to adjudicate conflicting claims to an obligation, whether the action is commenced by the obligor, where only one of the claimants can be served, or is commenced by one of the claimants, where he can secure personal jurisdiction over the obligor but not over the rival claimant.

We find no controlling precedent of the United States Supreme Court. It is true that in the Dunlevy case creditors of one of the claimants to the insurance proceeds had garnished Mrs. Dunlevy's interest before the insurance company sought to interplead the local claimants with Mrs. Dunlevy who was absent, but the Court was careful to point out that the interpleader action "initiated by the company was an altogether different matter" from the garnishment proceedings and that under the applicable state law a judgment exonerating the garnishee was not binding on the absent debtor whose claim against the garnishee the local creditors had unsuccessfully attempted to reach. (241 U. S. 518, 520-521.) Defendants rely on language in Bank of Jasper v. First National Bank, 258 U. S. 112, 118-119, suggesting a distinction for jurisdictional purposes between an action to reach a debt owed an absent defendant and an action seeking to establish

that the debt is owed directly to the plaintiff instead of to the absent claimant. In the Bank of Jasper case, however, the obligation had been embodied in a negotiable certificate of deposit that was not within the jurisdiction of the court, and the Supreme Court summarized its holding by stating that "As neither the certificates of deposit nor the holder thereof were within the State of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder." Accordingly, that case is not controlling here where the obligation has not been embodied in a negotiable document.

Decisions of other courts involving conflicting claims to choses in action, where the action has been commenced by one claimant who has secured personal jurisdiction over the debtor but not over the absent claimant, are in conflict as to whether there is jurisdiction to adjudicate the absent claimant's rights. (See, *e.g.*, sustaining or indicating jurisdiction: Cameron v. Penn. Mut. Life Ins. Co. [N. J. Eq.], 161 Atl. 55, 60; 173 Atl. 344, 346; Ely v. Hartford Life Ins. Co. [Ky.], 110 S. W. 265, 268; State v. Mueller [Mo. App.], 90 S. W. 2d 171, 174-176; Omaha Nat. Bank v. Federal Reserve Bank, 26 Fed. 2d 884, 887-889; Feuchtwanger v. Central Hanover Bank & Trust Co. [N. Y.], 43 N. E. 2d 434, 435; First Nat. Bank v. Bank of Horatio [Ark.], 255 S. W. 881, 882; Taylor v. Security Mut. Life Ins. Co., 77 N. Y. S. 1012, 1013; Oishei v. Pennsylvania R. Co., 102 N. Y. S. 368, 371, aff'd, 85 N. E. 1113; Morgan v. Mutual Benefit Life Ins. Co. [N. Y.], 82 N. E. 438, 441; Kumor v. Scottish Union & National Ins. Co. [Wyo.], 33 Pac. 2d 916, 920-922; Bush v. Missouri State Life Ins. Co. [Okla.], 207 Pac. 317, 319; Mutual

Home Assn. v. Zwatchka [Tex. Civ. App.], 297 S. W. 317, 318; Perry v. Young [Tenn.], 182 S. W. 577, 578; Sherman Nat. Bank v. Shubert Theatrical Co., 238 Fed. 225, 229; Morgan v. Mutual etc. Ins. Co., 16 Cal. App. 85, 90-93. Denying or indicating no jurisdiction: Mahr *et al.* v. N. U. F. Ins. Soc., 127 N. Y. 452, 460-462; Kelly v. Norwich Union Fire Ins. Co. [Iowa], 47 N. W. 986, 987; Royal Neighbors of America v. Fletcher [Okla.], 227 Pac. 426, 429; Cross v. Armstrong [Ohio], 10 N. E. 160, 164-166; Washington Life Ins. Co. v. Gooding [Tex. Civ. App.], 49 S. W. 123, 127; Redzina v. Provident Inst. for Savings [N. J.], 125 Atl. 133, 136; McBride v. Garland [N. J. Eq.], 104 Atl. 435, 436; Austin v. Royal League [Ill.], 147 N. E. 106, 109; Schoenholz v. New York Life Ins. Co., 188 N. Y. S. 596; Eisner v. Williams [Mich.], 298 N. W. 507, 509-510; Stockbridge v. Phoenix Mut. Life Ins. Co., 193 Fed. 558, 560.)

In the absence of a settled rule governing the situation before us, and in light of the fact that an intangible may be subjected to the jurisdiction of the court without personal jurisdiction over all of the parties involved for some purposes but not for others, we conclude that the solution must be sought in the general principles governing jurisdiction over persons and property rather than in an attempt to assign a fictional situs to intangibles.

It is significant that with respect to jurisdiction to tax intangibles (Curry v. McCanless, 307 U. S. 357, 373-374), jurisdiction over foreign corporations (Internat. Shoe Co. v. Washington, 326 U. S. 310, 316; Perkins v. Benguet Mining Co., 342 U. S. 437, 445), and jurisdiction to adjudicate trust obligations (Mullane v. Central Hanover Bank and Trust Co., 339 U. S. 306, 311-

313), emphasis is no longer placed on actual or physical presence but on the bearing that local contracts have to the question of overall fair play and substantial justice. A similar change in emphasis has been taking place with respect to personal jurisdiction over individuals. (*Cf.*, Pennoyer v. Neff, 95 U. S. 714; with Milliken v. Meyer, 311 U. S. 457, 462-463; Hess v. Pawloski, 274 U. S. 352; Allen v. Superior Court, 41 Cal. 2d 306, 310-313; Nelson v. Miller [Ill.], 143 N. E. 2d 673; see, Smyth v. Twin State Improvement Corp. [Vt.], 80 Atl. 2d 664.) "But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Internat. Shoe Co. v. Washington, *supra*, 326 U. S. 310, 316.)

In the present case, since the trustee is not and has not been a resident of California, section 417 of the Code of Civil Procedure precludes the entry of a personal judgment against him, and it is therefore unnecessary to determine whether his activities as trustee have sufficient connection with this state constitutionally to justify an assumption of personal jurisdiction without service of process here. The relevant contacts with this state are significant, however, in deciding whether due process permits exercising a more limited or quasi in rem jurisdiction to determine his and plaintiffs' interests in the intangibles in question.

We find no relevance in the distinction defendants seek to make between jurisdiction to take over a nonresident's

claim to a chose in action admittedly his and jurisdiction to establish that it was never his. In both situations the nonresident can protect his interest in the property only by submitting to the jurisdiction of the court. It is true that in the former situation he must litigate a controversy solely between himself and his creditor unrelated to pre-existing rights in the obligation garnished, whereas in the latter situation pre-existing conflicting rights to the obligation itself are involved; but this distinction alone has no bearing on the fairness of making him appear. It has been rejected in a case involving both real and personal property including intangibles (Loaiza v. Superior Court, 85 Cal. 11, 34-35), and does not exist with respect to controversies over corporate stock. (Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 12-13; Wait v. Kern River Mining etc. Co., 157 Cal. 16, 21; Amparo Mining Co. v. Fidelity Trust Co. [N. J.], 73 Atl. 249, 250-251; Michigan Trust Co. v. Probasco [Ind. App.], 63 N. E. 255, 257.) It is true that for some purposes the state of incorporation may be peculiarly appropriate for the purpose of litigating conflicting claims to corporate stock, but if so, it is because of relevant contacts there; if such contacts exist elsewhere, jurisdiction also follows. (Wait v. Kern River Mining etc. Co., *supra*, 157 Cal. 16, 21.) Similarly, in the case of other intangibles, jurisdiction must be determined in the light of the totality of contacts with the state involved. Indeed, many of the apparently conflicting decisions on the question before us could be reconciled on their facts, if not their language, on this basis. (*Cf.*, *e.g.*, Omaha Nat. Bank v. Federal Reserve Bank, 26 Fed. 2d 884, 887-889; Feuchtwanger v. Central Hanover Bank & Trust Co. [N. Y.], 43 N. E. 2d 434, 435; First Nat. Bank v. Bank of Horatio [Ark.], 255 S. W. 881,

882, Morgan v. Mutual Benefit Life Ins. Co. [N. Y.], 82 N. E. 438, 440-441; Kumor v. Scottish Union & National Ins. Co. [Wyo.], 33 Pac. 2d 916, 920-922; Perry v. Young [Tenn.], 182 S. W. 577, 578; with Mahr *et al.* v. N. U. F. Ins. Soc., 127 N. Y. 452, 460-462; Cross v. Armstrong [Ohio], 10 N. E. 160, 164; Eisner v. Williams [Mich.], 298 N. W. 507, 509-510.)

The present case is not one in which an obligor has invoked the jurisdiction of a court remote from the obligee solely for the purpose of terminating his obligation (see, Estin v. Estin, *supra;* Vanderbilt v. Vanderbilt, *supra*) or sought to compel conflicting claimants to adjudicate their rights in a forum of his own choice. (See, N. Y. Life Ins. Co. v. Dunlevy, *supra.*) The obligation plaintiffs seek to enforce grows out of their employment by defendants here. The payments involved are alleged to be consideration for work performed in this state. The Federation defendant is before the court. Under these circumstances, fairness to plaintiffs demands that they be able to reach the fruits of their labors before they are removed from the state. Moreover, fairness to the defendants who are personally before the court also demands that the conflicting claims of the trustee be subject to final adjudication. Even if we were to hold that his absence prevents the granting of the provisional remedies here sought, plaintiffs would not be foreclosed thereby from asserting that payment to him did not discharge the employers' obligation to them and that the Federation was independently liable for damages for breach of its fiduciary duty. The evil of exposing the obligor to actions to enforce the same obligation in two jurisdictions with the attendant risk of double liability would not be obviated. It was just such double liability

that was sustained in the Dunlevy case and gave impetus to the passage of federal interpleader legislation. (See, Chafee, Interstate Interpleader, 33 Yale L. J. 685, 711.) It is doubtful whether today the United States Supreme Court would deny to a state court the interstate interpleader jurisdiction that federal courts may exercise. A remedy that a federal court may provide without violating due process of law does not become unfair or unjust because it is sought in a state court instead. To sustain jurisdiction in these cases, however, we are not required to forecast the overruling of the Dunlevy case and to act on that basis. For the reasons stated above, this case is clearly distinguishable from the Dunlevy case, and the multiple contacts with this state fully sustain the jurisdiction of the superior court to exercise quasi in rem jurisdiction over the intangibles in question.

Let the writ of mandate issue in each case commanding respondent superior court to assume and exercise jurisdiction over petitioners' application for a preliminary injunction and the appointment of a receiver as prayed herein.

TRAYNOR, *J.*

We concur:

GIBSON, *C. J.*

SHENK, *J.*

CARTER, *J.*

SCHAUER, *J.*

SPENCE, *J.*

MC COMB, *J.*

APPENDIX B.

Memorandum for Counsel.

In the Superior Court of the State of California, in and for the County of Los Angeles.

John H. Anderson, Jr., *et al.*, Plaintiffs, vs. American Federation of Musicians of The United States and Canada, an unincorporated association and labor union, *et al.*, Defendants. No. 669,990.

William (Bill) Atkinson, *et al.*, Plaintiffs, vs. American Federation of Musicians of The United States and Canada, an unincorporated association and labor union, *et al.*, Defendants. No. 670,348.

A brief memorandum will be sufficient to indicate to counsel the basis of the court's determination in each case.

While there are a number of causes of action in each complaint, including claims of plaintiffs for damages as against the defendant Federation, the matters presently before the court with respect to the applications for preliminary injunctions and for appointment of a receiver fall within a narrower compass. The question first to be determined is that of jurisdiction and that problem is rooted in the contention of the plaintiffs that they, or persons whom they represent, are entitled to receive moneys payable by various defendants in the phonograph-record or television-film fields under certain agreements. The plaintiffs seek to enjoin those defendants from making payments of the moneys so claimed by the plaintiffs to the trustee of the Music Performance Trust Funds.

The trustee, Mr. Rosenbaum, although named as a party defendant in each case, cannot be personally served with process in this State, but is to be found in the State of New York. In view of that fact, does this court have

jurisdiction to grant an injunction or appoint a receiver as sought by the plaintiffs? In seeking an answer to that question, some guidance is found in an article by Fletcher B. Andrews in 49 Yale Law Journal at page 241 (reprinted in part in Selected Readings on Conflict of Laws at page 306), the article being entitled "Situs of Intangibles in Suits Against Non-resident Claimants". Certain distinctions are to be noted. The cases at bar do not involve the interpleader problem (New York Life Insurance Company v. Dunlevy, 241 U. S. 518). Moreover, there is not presented a case in which a plaintiff seeks to have applied, in satisfaction of an obligation owed to him by a non-resident, property of the non-resident in the form of a debt owed the latter by a debtor upon whom the plaintiff is able to obtain personal service of process (Harris v. Balk, 198 U. S. 215). The problem is, rather, that of conflicting claims to a debt owed or an intangible obligation for the payment of money undertaken by a third person. While the authorities are not consistent and while there has been no direct determination of the question by the Supreme Court of the United States, the sound view under the facts here presented appears to be that there is no jurisdiction to resolve the conflicting claims unless jurisdiction *in personam* can be obtained over each claimant.

If the court had jurisdiction to do so, the exercise of a sound discretion would probably require the granting of a preliminary injunction and, perhaps, the appointment of a receiver, at least with respect to the 10 percent and 21 percent payments under schedule "A" of the labor agreement in the Anderson case and with respect to the re-use payments in the Atkinson case. However, as set forth above, such jurisdiction does not exist.

Because the trustee, who is an indispensable party in the phase of each case under examination, is not subject to the process of the court, each application for a preliminary injunction and for a receiver will be denied *solely* upon the ground of lack of jurisdiction in the court. Counsel for the defendant Federation are requested to prepare a formal order in each case. The temporary restraining orders will not be dissolved until the court signs the formal orders to be submitted, or, with respect to the temporary restraining order in the Atkinson case, unless it shall expire prior thereto by its own terms.

Dated this 24th day of January, 1957.

JOHN J. FORD
Judge of the Superior Court

APPENDIX C.

Cal. Stat. 1951, ch. 1737, §48, West's Ann. Cal. Codes, Code Civ. Proc., §412:

"Where the person on whom service is to be made resides out of the State; or has departed from the State; or can not, after due diligence, be found within the State; or conceals himself to avoid the service of summons; or is a corporation having no officer or other person upon whom summons may be served, who, after due diligence, can be found within the State, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit or by the complaint on file, that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant or corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consist wholly or in part in excluding such person or corporation from any interest therein, such court, or judge, may make an order that the service be made by the publication of the summons."

Cal. Stat. 1951, ch. 43, §1, West's Ann. Cal. Codes, Code Civ. Proc., §413:

"The order must direct the publication to be made in a newspaper, to be named and designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once each calendar week; but publication against a defendant re-

siding out of the State, or absent therefrom, must be pursuant to Section 6065 of the Government Code, except in proceedings instituted pursuant to the provisions of Chapter 4, Title 3, Part 3, of this code. In case of publication, where the residence of a nonresident or absent defendant is known, the court, judge, or justice, must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post office. Service is complete upon the making of such personal service or at the expiration of the time prescribed by the order for publication, whichever event shall first occur.

"As used in this section 'post office' includes mail box, sub-post office, substation and mail chute or other like facility regularly maintained by the Government of the United States."

Cal. Stat. 1951, ch. 935, §1, West's Ann. Cal. Codes, Code Civ. Proc., §417:

"Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State at the time of the commencement of the action or at the time of service."

APPENDIX D.

Writs of Mandate.

In the Supreme Court of the State of California.

William (Bill) Atkinson, Jack Barsby, Alfred E. Brain, Clarence (Pete) Carpenter, Russell A. Cheever, Harriet Crawford, individually and on behalf of all other instrumental musicians similarly situated, Petitioners, vs. The Superior Court of the State of California, in and for the County of Los Angeles, Respondent. American Federation of Musicians, Columbia Broadcasting System, *et al.*, and Loews Incorporated, Republic Pictures, *et al.*, Real Parties in Interest. L. A. 24629.

WRIT OF MANDATE

The People of the State of California Send Greetings to the Respondent, the Superior Court of the State of California, in and for the County of Los Angeles:

Whereas, the Supreme Court of the State of California, *in bank*, on November 5, 1957, unanimously ordered a writ of mandate to issue in the above entitled proceeding as prayed for in the petition for writ of mandate on file herein; now, therefore,

You are hereby commanded to assume and exercise jurisdiction over plaintiffs' (petitioners') application for preliminary injunction and the appointment of a receiver in that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, numbered 670348, entitled William (Bill) Atkinson, *et al.*; Plaintiffs, v. American Federation of Musicians of the United States and Canada, etc., *et al.*, Defendants.

Witness the Honorable Phil S. Gibson, Chief Justice, and all of the Associate Justices of the Supreme Court of the State of California.

Attest my hand and the seal of this Court, this 6th day of December, 1957.

WILLIAM I. SULLIVAN,
Clerk of the Supreme Court
By _____
Deputy Clerk

In the Supreme Court of the State of California.

John H. Anderson, Jr., Burnett F. Atkinson, Robert Bain, Edwin Vance Beach, Roland E. Bundock, Lawrence B. Bunker, George Callender, individually and on behalf of all other instrumental musicians similarly situated, Petitioners, vs. The Superior Court of the State of California, in and for the County of Los Angeles, Respondent. American Federation of Musicians, Columbia Broadcasting System, *et al.*, and Loew's Incorporated, Republic Pictures, *et al.*, Real Parties in Interest. L. A. 24630.

WRIT OF MANDATE

The People of the State of California Send Greetings to the Respondent, the Superior Court of the State of California, in and for the County of Los Angeles:

Whereas, the Supreme Court of the State of California, *in bank*, on November 5, 1957, unanimously ordered a writ of mandate to issue in the above entitled proceeding as prayed for in the petition for writ of mandate on file herein; now, therefore,

You are hereby commanded to assume and exercise jurisdiction over plaintiffs' (petitioners') application for preliminary injunction and the appointment of a receiver in that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, numbered 669990, entitled John H. Anderson, Jr., *et al.* Plaintiffs, v. American Federation of Musicians of the United States and Canada, etc., *et al.*, Defendants.

Witness the Honorable Phil S. Gibson, Chief Justice, and all of the Associate Justices of the Supreme Court of the State of California.

Attest my hand and the seal of this Court, this 6th day of December, 1957.

WILLIAM I. SULLIVAN,
Clerk of the Supreme Court
By _____
Deputy Clerk

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Office - Supreme Court, U.S.
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MAR 20 1958
JOHN J. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 756

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION FILM SALES, INC., NATIONAL BROADCASTING COMPANY, INC., CALIFORNIA NATIONAL PRODUCTIONS, INC., LOEW'S INCORPORATED, REPUBLIC PRODUCTIONS, INC., REPUBLIC PICTURES CORPORATION and HOLLYWOOD TELEVISION SERVICE, INC.,

Appellants,

vs.

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE P. CARPENTER, RUSSELL A. CHEEVER, and HARRIET CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

No. 757

RADIO CORPORATION OF AMERICA, COLUMBIA BROADCASTING SYSTEM, INC., CAPITOL RECORDS, INC., LOEW'S INCORPORATED, DECCA RECORDS, INC., and CORAL RECORDS, INC.,

Appellants,

vs.

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER and GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

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SUBJECT INDEX

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IN THE

Supreme Court of the United States

October Term, 1957

No. 756

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION FILM SALES, INC., NATIONAL BROADCASTING COMPANY, INC., CALIFORNIA NATIONAL PRODUCTIONS, INC., LOEW'S INCORPORATED, REPUBLIC PRODUCTIONS, INC., REPUBLIC PICTURES CORPORATION and HOLLYWOOD TELEVISION SERVICE, INC.,

Appellants,

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Appellants,

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JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER and GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

POINT I.

The Judgments Below Are Final Within the Meaning of 28 USC Section 1257 and the Appeals Are Ripe for Decision.

Appellees make two contentions in Point I of their argument. First, they contend that this Court does not

have jurisdiction of these appeals because they are not appeals from final judgments. Second, they contend that if this Court does have jurisdiction because the appeals are from final judgments, it should not exercise its jurisdiction. Appellees err in both contentions.

A. The Judgments Below Are Final Within the Meaning of 28 USC Section 1257.

The judgments appealed from were entered in proceedings for writs of mandate.* Appellees assert that the judgments below are not final because the writs of mandate ordered the Los Angeles Superior Court to proceed with certain underlying litigation and that therefore there is remaining litigation which has not ended. Appellees rely upon *Radio Station WOW, Inc. v. Johnson,* 326 U. S. 120, 127; *Republic Gas Co. v. Oklahoma,* 334 U. S. 62, 70-72; and *Cobbledick v. United States,* 309 U. S. 323, 326. These cases are not in point. They were not concerned with whether judgments in separate proceedings for extraordinary writs are final but involved whether certain orders and judgments in the same action are final judgments within the meaning of 28 USC Section 1257. In *Radio Station WOW,* a judgment which directed immediate possession of property but which ordered an accounting was held to be a final one. In *Republic Gas Co. v. Oklahoma,* an order of the Corporation Commission ordering appellant to take gas ratably from another's wells but leaving for future determination the terms and conditions of such taking was held not to be a final

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*Appellees in note 1 on p. 4 of their Motion to Dismiss or Affirm state that the writs of mandate were issued after some of the notices of appeal were filed. This fact does not mean that those appeals were prematurely taken. See *Market Street R. Co. v. Railroad Commission,* 324 U. S. 548, 551-552.

judgment. In *Cobbledick v. United State*, an order denying a motion to quash a subpoena was held not to be a final one.

In determining whether a judgment was final within the meaning of 28 USC Section 1257, this Court has long distinguished judgments in actions for extraordinary writs (which contemplate no further proceedings in the same action but do contemplate further proceedings in the action to which the writ is addressed) from judgments or orders which contemplate further proceedings in the same action. Mr. Justice Holmes stated in *Mt. Vernon Cotton Co. v. Alabama Power Co.*, 240 U. S. 30, 31:

> "Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code, Act of March 3, 1911, c. 231, §237, 36 Stat. 1087, 1156, under the statutes of Alabama and by the common law. Code of 1907, §§4864-4867, 4872. *Weston v. Charleston*, 2 Pet. 449, 464, 465. The fact that it does not decide the merits of the principal suit is immaterial. It is not devoted to that point, but only to the preliminary question of the jurisdiction of the court in which that suit is brought."

This Court has continuously followed this rule. See *Madruga v. Superior Court*, 346 U. S. 556, 557; *Rescue Army v. Municipal Court*, 331 U. S. 549, 565; *Pacific Coast Dairy v. Department of Agriculture*, 318 U. S. 285, 293; *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8, 14; *Michigan Central R. Co. v. Mix*, 278 U. S. 492, 494; *Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 266 U. S. 200, 206.

B. These Appeals Are Ripe for Decision.

Appellees contend that "even though statutory grounds of appeal from a final judgment may be present, adequate reasons may impel this Court not to exercise such jurisdiction."* In support of this contention appellees rely on *Rescue Army v. Municipal Court*, 331 U. S. 549, 568, *et seq.* There, this Court held that it would not pass upon the federal questions in a case on appeal from a final judgment in a prohibition proceeding because the questions were presented in a general and abstract form and not in a narrow and clear-cut form and because the statutes had not been construed by the courts of the state. *Id.*, p. 584. See; also *Government and Civic Employees Organizing Committee, CIO v. Windsor*, 353 U. S. 364, 366; *Albertson v. Millard*, 345 U. S. 242, 245, citing *Rescue Army* as authority for the above rules. Neither of those obstacles to review is present in the cases at bar. In these appeals the constitutional question "rests upon a very narrow premise."** The question is not general or abstract. The California Supreme Court "on the basis of the extensive record before it"*** construed Section 412, California Code of Civil Procedure, and held that under the circumstances present it did not contravene the Fourteenth Amendment. All facts relevant to a decision of the federal question raised below appear in the record now before the Court. Future proceedings in the underlying litigation will not serve to clarify it. The federal question presented is ripe for decision.

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*Motion to Dismiss or Affirm, p. 14.

**Motion to Dismiss or Affirm, p. 16.

***Motion to Dismiss or Affirm, p. 17.

There are compelling reasons why this Court should now decide the question of whether the California courts have jurisdiction to proceed against these appellants. The underlying litigation is a controversy between two factions within the American Federation of Musicians. While certain causes of action for money are stated against the Federation, no such causes of action are stated against these appellants. It is alleged that these appellants are neutral in respect to the basic controversy. [R. Vol. Two, p. 26.] The companies were named as defendants only because they make payments to Samuel R. Rosenbaum pursuant to certain agreements which appellees claim should be cancelled, it being appellees' claim that the payments due thereunder should be made to appellees.

Shortly after appellees filed their action in California, Rosenbaum filed an action in New York for declaratory relief in which he seeks an adjudication that the agreements under which the companies make payments to him are valid. Thus there are two actions involving essentially the same issues, each proceeding toward a trial on the merits.

If the federal question presented to this Court is decided now on the merits, at least one-half of the expense of engaging in both actions would be avoided. If this Court decides that the California court cannot constitutionally exercise jurisdiction over Samuel R. Rosenbaum, then as to these appellants the underlying actions cannot proceed. [Jurisdictional Statement App. B, p. 15.] If this Court decides that the California court has jurisdiction over Rosenbaum the New York courts will undoubtedly hold that the New York action must abate pending determination of the California actions. If this

Court does not decide the constiutional question now presented, both the California and New York courts will proceed with their respective actions.*

Furthermore, if this Court does not rule on the merits of these appeals, the California judgments will become final. However, the courts of New York need not give full faith and credit to these judgments. The New York courts can be expected to adhere to the decisions of this Court in *Dunlevy, Bank of Jasper, Estin* and *Vanderbilt,* and in reliance upon those cases to treat any California decision as a nullity. The result could be that appellants would be required to pay twice—once to appellees as may be required by a California judgment, and once to Rosenbaum as may be required by a New York judgment.

These appeals are from final judgments and are ripe for decision. These appellants should not be required to remain in both underlying actions at double expense and with the attendant risk of conflicting judgments.

POINT II.

The Federal Question Is Substantial.

In deciding the question presented in favor of appellees the Court below made two errors. First, it failed to follow controlling decisions of this Court and instead observed that the federal question presented in the cases at bar had never before been decided by this Court.** Second, it held that "relevant contacts" with California of parties *other than* Rosenbaum permitted the Los Angeles Superior Court to exercise jurisdiction over

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*See *Rosenbaum v. Melnikoff*, 169 N. Y. S. 2d 194, wherein motions to dismiss the New York action were denied.

**Jurisdictional Statement App. A, p. 6.

him by substituted service of process and exclude him from his interest in certain agreements with these appellants.* We have pointed out in our Jurisdictional Statement (pp. 14-20) the reasons why the decisions below are in conflict with previous decisions of this Court. They will not be repeated here.

The court below believed that relevant contacts permitted the exercise of jurisdiction by the Los Angeles Superior Court. The contacts relied upon were contacts of parties other than Rosenbaum.**

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*Jurisdictional Statement App. A, p. 11.

**The only passage of the court's opinion that specifies the contacts it considered relevant is as follows :

> "The obligation plaintiffs seek to enforce grows out of their employment by defendants [appellants] here. The payments involved are alleged to be consideration for work performed in this state. The Federation defendant is before the court. Under these circumstances, fairness to plaintiffs demands that they be able to reach the fruits of their labors before they are removed from the state. Moreover, fairness to the defendants who are personally before the court also demands that the conflicting claims of the trustee be subject to final adjudication." [Jurisdictional Statement App. A, p. 11.]

The court erroneously summarized the contractual relationships involved. The employment of some of the appellees in California was not the consideration given to the companies for entering into the agreements involved in the basic actions. The consideration secured by the companies upon entering into the several labor agreements with the Federation was its promise that the appellant companies could employ members of the Federation at not less than specified wage rates and under specified working conditions. The work performed by appellees in making phonograph recordings was consideration not for the collective bargaining agreements but for the promises of the companies contained in the individual contracts made between appellants and appellees when a particular phonograph record or motion picture was produced. The latter agreements are not, of course, involved in these proceedings. And in any event, even if work done in California was in part the consideration received by appellants for the payments involved, it was not consideration given or received by Rosenbaum. His right is to receive payments from appellants in New York and to use the monies received pursuant to contracts negotiated, executed, delivered and accepted in that state.

Contacts of persons other than the nonresident with the state attempting to exercise jurisdiction are not a basis for permitting the exercise of jurisdiction over the nonresident. The rule that allows personal jurisdiction over a nonresident to be predicated upon his contacts with the state is based upon principles of fairness and substantial justice. It seems to us obvious that if fairness is the test of a state's power to determine the rights of a nonresident, it must be fairness in terms of the reasonableness of compelling the nonresident to appear and defend his rights in that state rather than another. See Sobeloff, "Jurisdiction of State Courts Over Non-residents in Our Federal System", 43 Cornell L. Q. 196, 208. Tangible property is necessarily located in a particular state and subject to regulation and protection there. It is, accordingly, reasonable to require a non-resident who claims to own such property to appear and defend his rights in the state where it is situated. Intangible property, however, is not necessarily located in any state. It is nothing more than a right to bring a lawsuit, a right which can be said to be located in a particular state only in the sense that its owner may go there if he chooses, and, if he can obtain jurisdiction over the person of his debtor, bring suit to compel payment. The fact that a nonresident *could* bring suit in a state to enforce his intangible rights, because persons whom he has the power to sue are subject to process there, is no indication that it is fair to force him to litigate in that state rather than in others with which he has had some substantial contact. If jurisdiction to adjudicate intangible

rights is a matter of fairness and is to be decided in terms of contacts, the only contacts that are relevant are those which connect the nonresident defendant to the state that wishes to compel him to appear. Contacts that others may have had with the state have no bearing on fairness to him.

The court below, after relying upon California contacts of persons other than Rosenbaum, attempted to justify its conclusion that an assumption of jurisdiction over Rosenbaum in these cases was fair by reasoning that since substituted service of process in such cases as *Harris v. Balk*, 198 U. S. 215, is permissible and since (according to the court's view) there is no significant distinction between the nonresident in *Harris v. Balk* and Rosenbaum here, it must be fair to permit jurisdiction over Rosenbaum by substituted service of process. The flaw in this reasoning is twofold. First, as pointed out in our jurisdictional statement, the plaintiff in *Harris v. Balk* alleged that the resident defendant was obligated to pay money to the nonresident and the plaintiff sought to enforce that obligation whereas here the plaintiff alleged that the resident defendant was *not* indebted to the nonresident defendant. Second, the foreign garnishment procedure approved in *Harris v. Balk* was not based on fairness. The holding that a defendant could be subjected to suit in any jurisdiction where the person of his debtor could be caught and served with process was accomplished exclusively by reasoning that the plaintiff asserted the right of the nonresident and thus pro-

ceeded upon the theory that there was property of the nonresident which could be dealt with by the courts of the state in which the debtor was found. In *Pennoyer v. Neff*, 95 U. S. 714, this Court had held that power to adjudicate could be asserted when (and only when) physical power could be exercised over the person or the property of a nonresident defendant. *Harris v. Balk* followed that principle, predicating jurisdiction on the fiction rather than disturb the symmetry of a logical system. To say that *Harris v. Balk* justifies an assumption of jurisdiction where the plaintiffs deny that the nonresident defendant has property within the state ignores the whole rationale of *Harris v. Balk*. In such a case there is not even a fiction upon which to base jurisdiction that admittedly cannot be based on anything else.

The court below erroneously distinguished controlling decisions of this court and incorrectly applied the rule of "revelant contacts" to the facts in these cases.

POINT III.

Rosenbaum Is an Indispensable Party to All Relief Sought Against These Appellants and They Have Standing to Raise the Question Presented.

Appellees contend in this Court, just as they have contended in each of the courts below, that Rosenbaum is not an indispensable party to that part of the *Anderson* case which concerns payments to Rosenbaum computed on the basis of 21% of the minimum wage scale rate paid to musicians in the production of phonograph records. They state that the agreement which provides for

such payments is the labor agreement and that Rosenbaum is not a party to the labor agreement. The courts below have rejected this argument and have held that Rosenbaum is an indispensable party to all of the relief sought against these appellants. [Jurisdictional Statement App. A, p. 3; App. B, p. 15.] The courts below have so held because under the provisions of the trust agreement, these appellants expressly agreed with Rosenbaum that they would pay him the sums measured by 21% of the minimum wage rate scale paid to musicians in the production of phonograph records. [R. Vol. Two, pp. 76, 78.] Under the labor agreement, these appellants also agreed with the Federation that they would pay these sums to Rosenbaum.

Appellees desire to cancel Rosenbaum's interest in the trust agreement. This they cannot do without necessarily affecting his rights under such agreement. Rosenbaum is an indispensable party to all of the relief sought against these appellants.*

This Court in *Standard Oil Co. v. New Jersey*, 341 U. S. 428, 431, approved the standing of a company personally served with process in New Jersey to contest by appeal the validity under the Fourteenth Amendment of a New Jersey statute which authorized substituted service of process upon nonresident stockholders who were indispensable parties in actions for escheat of their

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*See *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal. 2d 232, 73 P. 2d 1163; *Bank of California v. Superior Court*, 16 Cal. 2d 516, 522, 106 P. 2d 879, 883-884; *Willis v. Lauridson*, 161 Cal. 106, 117, 118 Pac. 530.

contractual rights under stock certificates issued by the company. Moreover, the courts below held that these appellants have standing to raise the question presented.

Respectfully submitted,

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Dated March 19, 1958.

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MAR 14 1958
JOHN T. FEY, Clerk

IN THE Supreme Court of the United States

October Term, 1957

No. [redacted]

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Appellant,

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION FILM SALES, INC., NATIONAL BROADCASTING COMPANY, INC., CALIFORNIA NATIONAL PRODUCTIONS, INC., LOEW'S INCORPORATED, REPUBLIC PRODUCTIONS, INC., REPUBLIC PICTURES CORPORATION and HOLLYWOOD TELEVISION SERVICE, INC.,

Appellants,

vs.

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE P. CARPENTER, RUSSELL A. CHEEVER, and HARRIET CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

No. _____

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Appellant,

RADIO CORPORATION OF AMERICA, COLUMBIA BROADCASTING SYSTEM, INC., CAPITOL RECORDS, INC., LOEW'S INCORPORATED, DECCA RECORDS, INC., and CORAL RECORDS, INC.,

Appellants,

vs.

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER and GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

Motion of Appellees to Dismiss the Appeals or, in the Alternative, to Affirm the Judgments.

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IN THE

Supreme Court of the United States

October Term, 1957

No. .....

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Appellant,

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION FILM SALES, INC., NATIONAL BROADCASTING COMPANY, INC., CALIFORNIA NATIONAL PRODUCTIONS, INC., LOEW'S INCORPORATED, REPUBLIC PRODUCTIONS, INC., REPUBLIC PICTURES CORPORATION and HOLLYWOOD TELEVISION SERVICE, INC.,

Appellants,

vs.

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE P. CARPENTER, RUSSELL A. CHEEVER, and HARRIET CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

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Appellants,

vs.

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER and GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

Motion of Appellees to Dismiss the Appeals or, in the Alternative, to Affirm the Judgments.

Appellees hereby move to dismiss each of the appeals filed by the appellants in each of the above cases upon the following grounds:

(1) None of said appeals has been taken in conformity to statute (28 U. S. C. 1257(2)), in that neither of

the judgments appealed possesses the requisite attributes of finality and ripeness for review.

(2) The federal questions raised are wanting in substantiality.

(3) The appellants do not have the standing to raise the federal questions presented.

Appellees move, in the alternative, to affirm the judgments appealed from upon the ground that the federal questions presented are unsubstantial.

Questions Presented.

Preliminarily, the question presented is the reviewability by this Court of the judgments appealed from. That question may be stated in the following terms:

Does the judgment of a state court of last resort in a mandamus proceeding which directs a trial court to hear and exercise its discretion with respect to applications for provisional relief, made for the purpose of preserving the subject matter of the action, but which does not direct the granting or withholding of any such relief, constitute an adjudication which possesses the requisite attributes of finality and ripeness for review, where residual "federal rights" issues remain in the case, and the underlying action must proceed to trial without regard to any determination which may be made by this Court?

Turning to the "questions presented" as posed in the jurisdictional statement filed by the appellants Columbia Broadcasting System, Inc., *et al.* (hereinafter referred to as the "Columbia J. S.") and the jurisdictional statement filed by the appellant Federation (hereinafter referred to as the "Fed. J. S."), in our view they are deficient in that they take no account of the pivotal factual premise

upon which the decisions below were predicated, *i.e.*, the connection of the relevant transactions with California. The question resolved below in the affirmative may thus be stated:

Where employees who live and work in California file an action for restitution of payments growing out of their employment in California, which payments are alleged to be consideration for work largely performed in California, and in form are owing to a nonresident by their employers over whom the court has jurisdiction *in personam,* as a result of the unauthorized diversion thereof by their collective bargaining representative over whom the court also has jurisdiction *in personam,* is constructive service upon the nonresident constitutionally permissible for the purpose of preserving such payments *pendente lite* and procuring an adjudication, limited in its operational effect to such *res,* that plaintiffs are the owners thereof?

There is also presented the related question:

Do the appellants have the requisite standing to raise the federal questions presented by them in the circumstances now prevailing?

Statutes Involved.

The relevant statutes of California authorizing service of process by publication or personal service outside the state in lieu thereof (Cal. Code Civ. Proc., Secs. 412 and 413), which are set forth in both jurisdictional statements (Appendix C, Columbia J. S.; pp. 4-5, Fed. J. S.), must be read in conjunction with another section expressly defining the meaning of "personal property" as used in said sections, as well as elsewhere throughout that

code. Section 17, subdivision 3, of the California Code of Civil Procedure (Deering's Cal. Code Civ. Proc., p. 9), reads as follows:

> "The words 'personal property' include monies, goods, chattels, things in action and evidences of debt." (Cal. Stats. 1951, Chap. 1737, Sec. 1.)

The complaints filed by the appellees in the underlying Superior Court actions allege certain causes of action against the appellants (as well as other defendants) involving alleged violations of Section 222 of the California Labor Code. That statute reads as follows:

> "It shall be unlawful in case of any wage agreement arrived at through collective bargaining, either wilfully or unlawfully, or with intent to defraud an employee, a debtor or any other person, to withhold from said employee any part of the wage agreed upon" (Cal. Stats. 1937, Chap. 357, p. 774, Deering's California Codes Annotated, *Labor*, Sec. 222, p. 54).

Statement of the Case.

The mandamus proceedings culminating in the "judgments"[1] appealed from were initiated by separate petitions filed by appellees. All of the appellants (who constitute a small proportion of the total number of defendants personally served in California) filed demurrers to said petitions.[2]

[1]The writs of mandate were issued after notices of appeal were filed by most of the appellants.

[2]For purposes now relevant all allegations of the petitions for mandate, as well as the complaints in the actions below, must be accepted as true (*Bandini v. Superior Court*, 284 U. S. 8, 14, 15-16; *Rescue Army v. Municipal Court*, 331 U. S. 549, 566; *Silverman v. Greenberg*, 12 Cal. 2d 252, 254; *Newlove v. Mer-*

A. The Anderson Case.

In the *Anderson* case, the underlying Superior Court action was filed by 90 plaintiffs on behalf of approximately 6,000 phonograph recording musicians, against 87 phonograph recording companies doing business in California, including 32 California corporations, 32 additional entities doing business in California (either as individuals or partnerships), and 23 corporations organized elsewhere but doing business in California. More than 95% of the total phonograph recording business in the United States is done by defendants regularly engaged in doing business in California and over whom the California courts have obtained jurisdiction by personal service within the state. With respect to the great majority of said defendants, jurisdiction over them is unobtainable except in California. All of the appellants were personally served with process in California, where they are all regularly and systematically engaged in doing business. All of the named appellees work in California in the production of phonograph records pursuant to the relevant collective labor agreements.

The *Anderson* complaint and petition for mandate allege that a collective bargaining agreement was negotiated in January, 1954 by the appellant Federation as exclusive bargaining representative of the phonograph recording musicians, whereby a wage increase offered by their employers was diverted by the Federation from the musicians employed under the relevant labor agreements to

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cantile Trust Co., 156 Cal. 657, 665; *Opinion of District Court of Appeal*, p. 17, Appendix, Fed. J. S.). The Federation's jurisdictional statement departs in several respects from, and both jurisdictional statements insufficiently reflect, the factual context which is thus controlling.

a trust fund (of which Rosenbaum is trustee) used for the giving of free public concerts, and from which they get virtually no benefit. During the negotiations leading to such agreement, the employers offered to pay such wage increase to their employees (amounting to 10% above the existing scale for the first two years, and 21% for the last three years, of the proposed five-year contract term). The Federation insisted that the employers make all such so-called "wage increase" payments to Rosenbaum instead of the performing musicians (appellees). The employers acceded to this diversion only after Mr. James C. Petrillo, president of the Federation, made it clear that there would be no labor agreement unless they consented thereto (see factual summary in the opinion of the California District Court of Appeal, pp. 21-22, Appendix, Fed. J. S.).

The collective bargaining agreement refers to such payments as being "for the services rendered by the persons covered by this agreement in the making of recordings" [*Anderson* complaint, Ex. A, p. 2, par. 3]. The petition for mandate alleges, and it was admitted below, that such payments were and are treated as a "labor cost" (for musicians' services) by the employers.

As a result of the diversion of these increases, the phonograph recording musicians have been and are still obliged to work at their 1946 wage scale.

Rosenbaum, the non-resident trustee of the trust fund, is *not* a signatory to the 1954 phonograph record labor agreement [Ex. A, *Anderson* complaint], which is the instrument providing for the making of said wage increase payments to Rosenbaum. Provisions for these 10%-21% wage increase payments were incorporated in

the *wage* schedule of said labor agreement signed by each employer and the Federation [*Anderson* complaint, Ex. A, p. 12, I(g)].

Concurrently with the making of such wage increase payments to the trustee, the employer signatories were also required to make certain "royalty" payments to the trustee under companion trust agreements with him. These royalties were computed on the basis of a graduated scale of percentages of gross sales of records. Each such trust agreement was correlative to a labor agreement of the kind previously described, wherein it was provided in part that the labor agreement was being entered into by the Federation in consideration of the employer's execution of the trust agreement.

B. The Atkinson Case.

The *Atkinson* case is also a representative action, brought by 22 plaintiffs on behalf of approximately 2,400 instrumental musicians employed in the production of motion pictures, for whom the appellant Federation acted as exclusive collective bargaining agent. Some 76 defendants have been named and personally served in California, consisting of 47 California corporations, 5 California partnerships, and 24 corporate defendants doing business in California but organized elsewhere. All of the entities served (including the appellants in *Atkinson*) were and are regularly engaged in the transaction of business in California. The majority of the defendants served do business solely in California, and personal jurisdiction over them is unobtainable elsewhere.

Almost 97% of all employment of instrumental musicians in the scoring of motion pictures in this country, including the motion pictures giving rise to the diverted

payments, has taken place and still takes place in California.

For approximately three years (1952 to 1955) all of the distributors of theatrical films on television entered into collective labor agreements with the Federation under which so-called "reuse" payments were to be paid to the musicians employed in such pictures, *i.e.*, from $25 to $75 per musician per picture. Concurrently, the signatories were required to make additional "royalty" payments to Rosenbaum for such reuse, under companion trust agreements which the Federation required them to enter into with Rosenbaum. Payments for each such motion picture released to television were made to the musicians performing in each of such films until June 9, 1955. On that day, by the unilateral edict of the Federation, payments which had already accrued in favor of these musicians as well as payments thereafter accruing from such reuse, were ordered to be paid to the trust fund. The excuse given by the Federation, *i.e.*, that the musicians could not be located, was spurious.

The Federation asserts that "the Federation was not" a party to the trust arrangement between the motion picture distributors and the trustee (p. 6, Fed. J. S.). This statement ignores the fact that every trust agreement resulted from a negotiation between the distributor and the Federation (not Rosenbaum), and from a contemporaneous labor agreement with the Federation (governing "re-shooting" of any scenes for television purposes) requiring the distributor to sign the trust agreement as a condition precedent to the effectiveness of the labor agreement. Performance of the trust agreement was specifically exacted by the Federation in each correlative labor agreement.

The Federation is also in error in asserting that the action of the Federation in June, 1955, whereby it put an end to the making of reuse payments directly to the musicians who scored the motion pictures, operated only "prospectively" (p. 6, Fed. J. S.). All such payments which *had theretofore accrued* in favor of the musicians who scored the motion pictures were included in the diversions to the trust fund (these and other salient facts will be found in the factual summary appearing in the opinion of the California District Court of Appeal, pp. 16-20, Appendix, Fed. J. S.).

C. Genesis of the Underlying Suits.

The genesis of the underlying suits, as disclosed by the record below, is the organized resistance to the Federation's trust fund policies of musicians who reside in California and who work there under the relevant collective agreements. They belong to Los Angeles Local 47 of the Federation. Some 3500 California musicians, whose services are utilized from time to time in the production of motion pictures and in the manufacture of phonograph records, have resisted the practices of the Federation and their officers of bargaining away wage and employment benefits resulting from their services and which are procurable for them, in order to enrich the trust fund at their expense. In *Anderson*, the phonograph recording musicians objected to the appropriation to the trust fund of 21 cents for each dollar paid to the musicians for their services (as well as "royalties" paid by their employers) under the collective agreements here involved; and in *Atkinson*, the musicians who record music used in motion pictures objected to the deprivation of payments formerly received by them, as well as the Fed-

eration's diversion of all other payments to the trust fund from reuse on television of theatrical films produced by them.

The suits were filed after all efforts within the structure of the Federation to procure redress proved abortive. The witnesses whose testimony is required by the appellees to establish their claims are primarily California residents. Witnesses who live and work in California can establish the hostility and ill-founded motives of the Federation in effectuating the trust fund diversions, as well as the customs and prevailing practices in the industry of making reuse payments to members of other talent guilds when theatrical films are used on television. The necessary witnesses to establish the protests and futile efforts to procure relief within the Federation, including specific measures taken by the membership of Los Angeles Local 47 to that end, are California residents. Their testimony is likewise required in each case to establish the specific violations of Section 222 of the California Labor Code (see "Statutes Involved," *supra*).

D. The Gravamen of the Underlying Actions.

The gravamen of each action is that the Federation, as the collective bargaining representative of the appellees, breached its fiduciary duties to appellees in diverting to the trustee actual, as well as obtainable, wages and employment benefits deriving from the rendition of their services under the relevant collective agreements.[3] It is

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[3]Payments by an employer to a trust fund which arise from a collective labor agreement or from collective bargaining negotiations are *deemed wages*, even though the agreement expressly states that they shall not be so regarded (*United States v. Carter*, 353 U. S. 210, 217-218).

alleged in the complaints and petitions for mandate (and the demurrers to said petitions must be deemed to concede for present purposes) that the Federation imposed upon the appellees an involuntary and discriminatory subsidy out of their earnings or potential earnings in order that 97½% of the members of the Federation who do *not* work in the industries involved may secure benefits from the trust fund; and that the Federation was actuated by motives of hostility toward the appellees and by the personal aims of its executive officers to curry favor with some 650 other locals of the Federation (whose members do not work in the recording industries), to the end of perpetuating themselves in office.[4]

The complaints and petitions for mandate assert that the diversions of wage increase, reuse and royalty payments constitute a fraud upon the employees (appellees); and that they are in equity entitled to the payments involved. It is also alleged that said diversions represent unlawful deductions from the musicians' wages in violation of Section 222 of the California Labor Code (see "Statutes Involved," *supra*). Restitution is sought of the payments sought to be impounded through the imposition of a constructive trust thereon in favor of the appellees.

The complaint in each case also contains certain causes of action for damages against the Federation, relating to diverted payments to Rosenbaum made prior to the filing of the underlying suits. These are separate and

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[4]The impropriety of the Federation's conduct and its violation of duty is indicated by the recent case of *Conley v. Gibson*, 355 U. S. 41, 46, 78 S. Ct. 99, 102, decided November 18, 1957; *Ford v. Huffman*, 345 U. S. 330, 337-338; *Radio Officers' Union, etc. v. N.L.R.B.*, 347 U. S. 17, 47, 48; *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, 202-203; *J. I. Case Co. v. Labor Board*, 321 U. S. 332, 338).

apart from the payments which were sought to be impounded. The issues on these appeals do not affect said causes of action, nor the trial thereof.

E. Proceedings Subsequent to State Supreme Court Writs of Mandate.

Following the issuance of the writs of mandate by the California Supreme Court, appellees' applications for preliminary injunctions and receiver *pendente lite* in each of the underlying actions came on for hearing in the California Superior Court. On January 17, 1958, an order was made in the *Anderson* case enjoining the appellants and other debtor defendants personally served from making any of the 21% wage increase payments under the phonograph record labor agreement to Rosenbaum; and appointing a receiver (a Los Angeles bank) to collect such payments during the pendency of said action. Appellees filed the bond ordered as a condition (in the sum of $50,000); and the receiver has duly qualified and is now acting as such. The motion for provisional relief in *Atkinson* was denied *in toto* on January 8, 1958. Appellees thereafter petitioned the California Supreme Court to command the Superior Court to grant provisional relief in *Atkinson*. This was denied without opinion on February 5, 1958.

ARGUMENT.

I.

The Judgments Appealed From Lack the Requisite Finality and Ripeness for Review.

The California Supreme Court did nothing more than to command the Superior Court to exercise its discretion with respect to the granting or withholding of provisional relief. That has been done; favorably (in part) to the appellees in *Anderson;* and unfavorably in *Atkinson*. Although precedent will be found for regarding a writ of mandamus as a final judgment under certain circumstances, it is submitted that the judgments in the instant cases should not be so regarded. Here the issues were projected on motions for provisional relief solely to preserve the subject matter of the actions *pendente lite.*[5]

In each of the cases cited by appellants involving judgments held to be appealable, a definitive ruling by this Court on the issues raised therein was tantamount, for all practical purposes, to ending the underlying litigation or determining the ultimate result (*Rescue Army v. Municipal Court*, 331 U. S. 549, 568). In each of the instant cases, no action by this Court can affect the trial of the damage claims against the Federation, or any causes of action which may be asserted against the debtor appellants for losses suffered by appellees in violation of Section 222 of the California Labor Code. Such claims will be unaffected by any action which may be taken on the issues now before the Court. This is so whether or

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[5]The granting of provisional relief, under California law, "does not amount to an adjudication of the ultimate rights in controversy." (*Miller & Lux v. Madera Canal, etc. Co.*, 155 Cal. 59, 62-63; *People v. Black's Food Store*, 16 Cal. 2d 59, 62; *Kendall v. Foulke*, 180 Cal. 171, 175).

not the appellees, by appropriate amended and supplemental pleadings, should assert independent or further claims against the debtor appellants for payments heretofore or hereafter made to Rosenbaum in fraud of appellees' rights.[6]

In any event, even though statutory grounds of appeal from a final judgment may be present, adequate reasons may impel this Court not to exercise such jurisdiction (*Rescue Army v. Municipal Court*, 331 U. S. 549, 568 *et seq.*; citing many illustrations). An oft-invoked ground for declining to exercise such jurisdiction is the established precept that "where the remaining litigation may raise other Federal questions that may later come here . . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary review" (*Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 127; *Republic Gas Co. v. Oklahoma*, 334 U. S. 62, 70-72; *Cobbledick v. United States*, 309 U. S. 323, 326).

The vice of piecemeal review is demonstrable in the instant cases. There still will remain for determination the liability of appellants for payments actually made as well as the damage claims against the Federation. Furthermore, the Federation has pleaded in its answer in each case the defense that "in entering into the contracts and agreements referred to . . . . defendant Federation did so pursuant to its authority and duty as exclusively vested and defined by the National Labor Relations Act and said Labor Management Relations Act, 1947." The

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[6] As noted by the California Supreme Court, payment to Rosenbaum would not discharge appellants' liability to appellees (p. 11, Appendix A, Columbia J. S.; p. 10, Appendix, Fed. J. S.). The trial of such damage claims would not be affected by any action which may be taken here.

Federation also claimed upon the hearing in the Superior Court which followed issuance of the writs of mandate, that the California courts lacked jurisdiction because of the alleged exclusivity of federal jurisdiction. Thus, a residuum of "federal rights" issues, including a different jurisdictional attack, would remain after a review at this time.

A holding now that the judgments are not ripe for review will not preclude this Court from passing upon the jurisdictional issues raised in the event of a review by this Court after a final judgment terminating the underlying litigation. In the event of a dismissal for lack of the requisite finality or ripeness, the appellants' constitutional objections would be "saved" to them for assertion in this Court in the event of any review of a final judgment in the underlying litigation (*Republic Gas Co. v. Oklahoma*, 334 U. S. 62, 72). Even though the judgments of the California Supreme Court now sought to be appealed from should be regarded "as laying down the law of the case, this court will not be thus bound" (*Grays Harbor Co. v. Coats-Fordney Co.*, 243 U. S. 251, 257).

Since the proceedings below dealt with provisional relief, such final judgment would moot the instant appeals without impairing the assertibility in this Court of the points now raised as an incident to review of such final judgment (*Champlin Refining Co. v. Corporation Commissioner*, 286 U. S. 210, 224; *Sterling v. Constantin*, 287 U. S. 378, 386).

In *Atkinson*, there is an additional circumstance which militates against reviewability of the judgment. Following the issuance of the writ of mandate in that case, the Superior Court denied on the merits the appellees' mo-

tion for provisional relief. As the record stands, the appellants are the prevailing parties on the merits with respect to the motion which they contend the Superior Court had no jurisdiction to determine. No appeal has been taken from the order denying provisional relief. None is intended. The claimed possibility of a new motion by appellees for provisional relief is purely theoretical and appears to us as an exercise in futility. The contracts involved in *Atkinson* expired on January 31, 1958. To speculate further that the Superior Court might reverse itself on a motion which appellees have no intention of making is pure fancy. No one can vouchsafe that when the case comes on for trial there will be payments owing by any debtors, and hence whether there will be any *res* remaining which may be sequestered by the appellees. Thus, there is ample justification for declining to review that case "until necessity compels it" (*Rescue Army v. Municipal Court*, 331 U. S. 549, 569).

II.

In View of the Recent Reaffirmation by This Court of the Governing Principles Applied by the California Supreme Court, the Federal Question Is Devoid of Substantiality.

The appellants' claim that due process has been infringed by the judgments of the California Supreme Court rests upon a very narrow premise. It is said that California lacked the jurisdictional competence to deal with these intangibles because the appellees were not claiming in the right of Rosenbaum but adversely to him. The argument runs that where intangibles are involved, the plaintiff must concede that the nonresident owns the intangible; and if the plaintiff claims that he has a superior right, or that the nonresident never acquired any

legal right thereto, *quasi in rem* jurisdiction over the intangible based on constructive service is a constitutional impossibility. The appellants also argue the corollary proposition that an intangible may be subjected to court control (on the basis of constructive service) only where it is sought to appropriate the same toward the satisfaction of another or independent claim against the nonresident.

In rejecting the contention that due process and state power turn on such theoretical differentiation, the California Supreme Court held that in respect to the intangibles in question, "jurisdiction must be determined in the light of the totality of contacts with the state involved" (p. 10, Appendix A, Columbia J. S.; p. 9, Appendix, Fed. J. S.). The correctness of the test applied by California is reflected by the recent pronouncements of this Court in *McGee v. International Life Insurance Co.*, 355 U. S. 220, 223 (see also cases there cited).

On the basis of the extensive record before it, the California Supreme Court found that "the multiple contacts with this state fully sustain the jurisdiction of the superior court to exercise *quasi in rem* jurisdiction over the intangibles in question" (p. 12, Appendix A, Columbia J. S.; p. 11, Appendix, Fed. J. S.). That abundant support for such finding reposes in the record may be readily discerned from the summary hereinbefore set forth (see "Statement of the Case", *supra*).

The appellants stress the fact that Rosenbaum was never "present" in California. Any pre-existing doubt with respect to the abandonment of "presence" within a state as a prerequisite to jurisdiction under due process was laid to rest in the *McGee* case. In upholding a

personal judgment for money on the basis of constructive service under a California statute governing insurance claims against a defendant corporation which never had "any offices or agents in California," and had "never solicited or done any insurance business in California" (355 U. S. at p. 222), this Court said (*ibid.*):

> "In a continuing process of evolution this Court accepted and then abandoned 'consent', 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations."

The appellants' attempt to impute to Rosenbaum absolute detachment from California, so far as the relevant transactions are concerned, is to dismiss completely the legal relationship which exists between him and his promisee (the Federation). His role was such that he did not become the obligee of *any* payments under *any* contracts unless and until the Federation entered into a *labor* agreement which called for such payments (either by provision therein or in the correlative trust agreement). It is therefore fanciful to say therefore that no matter how much activity and employment took place in California under the relevant agreements giving rise to the payments in question, the underlying transactions have no "substantial connection" with California.

Likewise devoid of substance is the claim that jurisdiction must fail because the contracts were allegedly entered into in New York and are "performable" there (meaning presumably that the actual *receipt* by Rosenbaum of remittances takes place in New York). A substantial part of the "performance" giving rise to the impounded payments in the *Anderson* case takes place in California, where at least one-third of all this country's

phonograph records are produced. Moreover, this Court has recognized that in considering due process, "conceptualistic discussion of theories of the place of contracting or of performance" of a contract must yield to the realities of a given situation. Where denial of due process is asserted by a non-resident, "great weight" is placed upon the practical consequences of the relevant transactions; and "to the unwisdom, unfairness and injustice" of requiring resident claimants of a particular forum to assert their remedies "only in some distant state" (*Hooperston Co. v. Cullen*, 318 U. S. 313, 316-317; *Travelers Health Ass'n v. Virginia*, 339 U. S. 643, 648; *McGee v. International Life Insurance Company*, 335 U. S. 220, 222).

For purposes of *quasi in rem* jurisdiction, it has been frequently held by this Court that a debt may be validly attached, garnished or sequestered by injunctive process, receivership or other appropriate means in any forum where the debtor or fundholder may be sued. This is so without regard to the place o creation of the debt, or the agreed place of payment (*e.g., Pennington v. Fourth National Bank*, 243 U. S. 269; *Harris v. Balk*, 198 U. S. 215; *Security Savings Bank v. California*, 263 U. S. 282; *Standard Oil Co. v. New Jersey*, 341 U. S. 428, 443; *Jellenik v. Huron Mining Co.*, 177 U. S. 1, 12-14). Contrary to appellants' contention, cases upholding such jurisdiction were not limited to situations where the plaintiffs were seeking to have the intangibles appropriated to the satisfaction of independent claims against the non-residents, but included situations where the plaintiffs were asserting rights of ownership in the intangibles (*e.g., Jellenik, Security* and *Standard Oil* cases, *supra*).

In *Jellenik*, this Court expressly rejected the contention that jurisdiction to determine conflicting claims predicated on constructive service upon a nonresident is limited to personal property susceptible of "manual possession"; and held that it was immaterial whether the adverse interests sought to be adjudicated related to "chattels or choses in action, or property in the nature of choses in action" (177 U. S. at pp. 12-14).

In *Standard Oil Company v. New Jersey, supra* (involving escheat of intangibles), this Court held, in the face of constitutional objections in parallel with those asserted here, that sequestration of debts (declared stock dividends) through jurisidction over the debtor, and constructive service on the nonresident claimants, empowered the court to adjudicate ownership of the intangibles. This power existed notwithstanding the fact that funds which had been set apart for payment of the corporate dividends and the stock in question were physically located outside the forum state. The court likened the effect of jurisdiction over the debtor to jurisdiction over tangible property within a state (p. 443). The Court held (p. 439):

> "That power to seize the debt by jurisdiction over the debtor provides not only the basis for notice to the absent owner but also for taking over the debt from the debtor." (See also *Security Savings Bank v. California*, 263 U. S. 282, 285; *Harris v. Balk*, 198 U. S. 215, 222.)

In essence, the argument of the appellants that there would be a *res* if appellees were claiming *under* Rosenbaum rather than adversely to him, is an oblique way of saying that a plaintiff may only sequester a nonresident's

title to a chose in action. In *Propper v. Clark*, 337 U. S. 472 (reh. den. 338 U. S. 841), where intangibles were involved (consisting of music royalties owed by ASCAP to an Austrian association), this Court pointed out that the requirement of control over the intangible:

> ". . . can be met *in other ways than seizure of title*, e.g., by an injunction against transfer of the property (citation), by an attachment (citation), or by personal service on the party holding the property within the state (citation). We have no doubt that where property is in a state and comes under the control of a court, as here by appointment of the temporary receiver, it is fair to permit substituted service (citation)." (p. 488). (Emphasis added.)

The last sentence has particular pertinence here. The payments made by the debtor appellants to the receiver in the *Anderson* case constitute a fund under the actual control of the California court. To persist in saying there is no *res* which California may lay hold of is to defy reality. A final judgment disposing of such *res* would be entitled to full faith and credit; and obedience on the part of any appellant, or any debtor over whom the California Superior Court has jurisdiction *in personam*, to the injunction and receivership order, or to any such judgment, would exempt such debtor from liability for non-payment to Rosenbaum (*Harris v. Balk*, 198 U. S. 215, 226; *Pennington v. Fourth National Bank*, 243 U. S. 269; *Security Savings Bank v. California*, 263 U. S. 282, 287; *Standard Oil v. New Jersey*, 341 U. S. 428, 443). Accordingly, if Rosenbaum should assert any claim in the New York suit which he instituted during the pendency of the California suits, or in any other

suit, the appellants could set up the California proceedings in bar, at least to the extent of the *res* subject to the control of the California courts.[7]

The decisions of this Court cited by appellants as purportedly supporting their contention that jurisdiction was lacking, *i.e., New York Life Ins. Co. v. Dunlevy,* 241 U. S. 518; *Bank of Jasper v. First National Bank,* 258 U. S. 112; *Estin v. Estin,* 334 U. S. 541; *Vanderbilt v. Vanderbilt,* 354 U. S. 416, are clearly distinguishable.

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[7]Rosenbaum commenced his action in New York (wherein the positions taken by the Federation and the trustee are in accord) several weeks *subsequent* to the original filing of the *Anderson* and *Atkinson* actions in California, and *subsequent* to the issuance by the California court of orders to show cause why it should not grant appellees' motions for preliminary injunctions and a receiver. In the New York action, Rosenbaum named a handful of New York musicians and some, but far from all, of the defendants named in the California actions. Countless defendants personally served in California are not named and could not be served within the jurisdiction of New York. On December 18, 1957 the Appellate Division of the New York Supreme Court, in denying "without prejudice" a motion by said musician defendants for a dismissal of the New York action, stated in part:

> "There is more than a suspicion that the action of the trustee [Rosenbaum] in seeking a judicial declaration that the several agreements are valid, is motivated by the existence of the action in California in which the present plaintiff, as trustee, is named as a defendant" (New York Law Journal, December 18, 1957, p. 4, column 6).

That court furthermore indicated the non-representative character of the New York suit by stating:

> "We recognize the possibility that some of the individual defendants named as members of the federation and constituting those necessary to make this a class action may be 'captive' parties. Otherwise stated, it appears that some, if not all of these individual defendants are defending this action within certain boundaries defined by officials of the federation."

There has been and is no impediment now, to a motion by appellants in the New York action (wherein issue is not yet joined by all parties), for a stay pending determination of the prior California suits.

The *Dunlevy* case, which involved interpleader by a debtor, held that a debtor can not exonerate his personal liability to a non-resident by interpleading conflicting claimants in a forum of his choice, and thereby convert his *in personam* liability into one *quasi in rem*. All three California courts which passed on the jurisdictional question in the instant cases noted the inapplicability of interpleader cases. *Bank of Jasper* involved an indebtedness which had become merged in negotiable certificates of deposit that were *not within the forum state* (Florida). There was therefore no *res* within the state. These controlling facts were thus held to be dispositive of the issue:

> "As neither the certificates of deposit nor the holder thereof were within the state of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder." (258 U. S. 112, at p. 119).

That case is therefore not authority for the proposition that there is no *res* in the instant cases.

Estin v. Estin, heavily relied upon by appellants in this Court and in the courts below, is a migratory divorce case. It involved the extent to which *in personam* liability for alimony may be annulled by a debtor husband, where such liability has been *duly adjudicated* by a New York court having personal jurisdiction over both parties. This Court held that Nevada had no power, in a subsequent suit for divorce instituted by the husband, to annul his liability under the previous New York judgment on the basis of substituted service upon the wife. That case, as well as *Vanderbilt v. Vanderbilt*, 354 U. S. 416, and like cases, concerned themselves with protection of the right to marital support or alimony against destruction by

means of "ex parte divorce". They call into play different considerations and facts from those involved here.

Notwithstanding appellant Federation's suggestion to the contrary (p. 15, Fed. J. S.), the decision of the California Supreme Court is consistent with many other decisions of state courts of last resort (see collection of cases cited by that court; pp. 7-8, Appendix A, Columbia J. S.; p. 7, Appendix, Fed. J. S.).[8] At least two Circuit Courts of Appeal have similarly upheld *quasi in rem* jurisdiction under comparable circumstances (*Omaha National Bank v. Federal Reserve Bank*, 26 F. 2d 88, cert. den. 278 U. S. 615; *Thompson v. Terminal Shares*, 89 F. 2d 652, 656-657, cert. den. *sub nom. Guaranty Trust Co. v. Thompson*, 302 U. S. 735).

To contend that a debt may be sequestered or appropriated if the plaintiff is claiming a property interest therein under a non-resident, but that it may not be constitutionally sequestered if the plaintiff is a defrauded *cestui* claiming a better right therein than that of the non-resident, is to say that "traditional notions of fair play and substantial justice" (*McGee, supra*, at p. 222) permit the exercise of state power in the former case, but not in the latter. Such shrinkage of *quasi in rem* jurisdiction is not justified by any genuine or prevailing precepts of due process and is directly opposed to the current of decisions.

It is submitted that the contentions advanced by appellants are lacking in substantiality.

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[8]As pointed out by the California Supreme Court, the cases of other state courts cited by appellant Federation may be "reconciled on their facts" when the "totality of contacts with the state involved" becomes the frame of reference (pp. 10-11, Appendix A, Columbia J. S.; pp. 9-10, Appendix, Fed. J. S.).

III.

The Appellants Do Not Have the Standing to Raise the Federal Questions Presented.

Viewed in the context of the provisional relief which has actually been granted, the standing of appellants is dubious. The only moneys which have been impounded by the Superior Court are those which flow in the *Anderson* case from labor (not trust) agreements entered into between the *Federation* and the appellants, over whom the California court had *in personam* jurisdiction. These are the payments computed on the basis of 21% of the wages earned by the musicians in the production of phonograph records. Rosenbaum is *not* a signatory to these agreements. Whatever interest he has derives from the promisor's (employer's) promise to the promisee (the Federation) to make such wage increase payments to Rosenbaum. As such third party beneficiary he stands in the promisee's shoes, and cannot acquire a better right against the promisor than his promisee had (*Alexander v. Equitable Life Assurance Society*, 233 N. Y. 300, 306; *Gennett v. Smith*, 244 App. Div. 3, 278 N. Y. Supp. 478, 480).[9] Thus, while Rosenbaum may be a proper party in respect to the wage increase payment agreements, he is *not* an *indispensable* party in view of the Superior Court's jurisdiction *in personam* over the promisor as well as the promisee under whom he claims.[10] The Superior Court thus had before it the parties to the transactions and agreements whose conduct is claimed to be a fraud upon the appellees.

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[9]The appellants make the point that the agreements are governed by New York law.

[10]The California cases cited by appellants anent indispensable parties (p. 10, footnote, Columbia J. S.) are quite different from the situation before us.

It is submitted that where the contracting parties to a written agreement claimed to constitute a fraud on a *cestui* are personally before the court, they have no constitutional right to bar an adjudication as to whether they had a right to make such contract, on the plea that the destined recipient of the fruits of the fraud was absent. Apart from these considerations, the debtor appellants have no constitutional right to bar a determination as to whether such payments are proscribed deductions from the wages of appellees in violation of Section 222 of the California Labor Code. Moreover, if they are in violation of the statute, they have no constitutional right to continue to make such illegal deductions until the recipient of the illegal payments is personally served in the forum. In the circumstances prevailing, the application below of the relevant publication statute did not result in any injury to the appellants legally cognizable as a ground of constitutional objection on their part. One may not derivatively assert, or appropriate to himself, a constitutional right in favor of a third party (*Ashwander v. Valley Authority*, 297 U. S. 288, 347; *Barrows v. Jackson*, 345 U. S. 249; *Viellen v. Neilston Warehouse Co.*, 311 U. S. 531).

Additionally, the appellant Federation is not a party enjoined under the preliminary injunction issued in the *Anderson* case. Unlike the debtor appellants, the Federation is not obligated to make *any* payments to Rosenbaum in *Anderson* or *Atkinson*. There is no claim that any of *its* property is being taken without due process of law, either because of any alleged risk of double payment or otherwise. We therefore perceive no tenable basis upon which the Federation may assert the alleged constitutional

infirmity ~~which is said~~ to inhere in constructive service on Rosenbaum.

In view of the circumstance that appellants have prevailed on the merits with respect to appellees' motion for provisional relief in *Atkinson*, and of the consequences of the Superior Court's denial of provisional relief in that case (see last paragraph, point I, *supra*), we submit that the appellants do not now have the requisite standing to assert the constitutional questions presented.

Conclusion.

Each of the appeals should be dismissed or, in the alternative, the judgments appealed from should be affirmed.

Dated: February 28, 1958.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1957

No. 759

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

WILLIAM (BILL) ATTERBURY, JANE BARRY, ALFRED E. BEATY, CHARLTON (PAT) CARPENTER, BERNICE A. CARPENTER, HARRIET CARTWRIGHT, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

JOHN H. ATTERBURY, JR., DOROTHY F. ATTERBURY, BARRY BATE, HOYT VANCE BEATY, RICHARD H. BOTTICHER, LAWRENCE E. BOWMAN, GEORGE CARPENTER, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

On Appeal From the Supreme Court of California

SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE (PETE) CARPENTER, RUSSELL A. CHEEVER, HARRIET CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER, GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

On Appeal From the Supreme Court of California

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of California sustaining as constitutional under the Fourteenth Amendment to the Federal Constitution a statute of the State of California.

OPINION BELOW

The opinion of the Supreme Court of California is reported at 49 Advance California Reports 339, 41 BNA, LRRM 2151, and that of the California District Court of Appeal is reported at 150 ACA 484.863, 310 P 2d 145. The opinion of the Superior Court in and for the County of Los Angeles is not reported. Copies of the three opinions are attached hereto as Exhibit A.

JURISDICTION

Appellees in each case petitioned the California District Court of Appeal for a writ of mandate (pursuant to California Code of Civil Procedure Sections 1084-1097, Deering's California Codes, Civil Procedure, pp. 506-512), directing the Superior Court in and for Los Angeles County to exercise jurisdiction in respective actions in which each group of appellees were plaintiffs. The petitions were heard together, and, in a single opinion and judgment entered on April 24, 1957, said court granted the writs of mandate. By order entered on May 21, 1957, said Court denied a petition for rehearing but modified its opinion. Upon petitions for hearing filed by appellant herein and others, the Supreme Court of California, by order entered on June 19, 1957, vacated the judgment of the District Court of Appeal and granted rehearing. Upon hearing in the Supreme Court of California, that Court entered judgment on November 5, 1957, granting the writs of mandate, and the notice of appeal was filed in that Court on December 3, 1957.

This Court has jurisdiction to review by appeal the judgment of the Supreme Court of California under 28 U.S.C. § 1257(2).

It has been held by this Court that it has jurisdiction to review by appeal the final judgment in a mandamus proceeding in *Detroit & M. R. Co.* v. *Michigan R. Com.*, 240 U.S. 504, 570-571, and this Court exercised jurisdiction by appeal to review a judgment of the Supreme Court of California in a mandamus proceeding in *Pacific Coast Dairy* v. *Dept. of Agriculture*, 318 U.S. 285.

QUESTIONS PRESENTED

A. Where plaintiffs in an action in California claim that debts, owing to a New York trustee under the terms of contracts made in New York, are owing to plaintiffs instead of to said trustee because said contracts are invalid, and said trustee has never resided in California, and has not been served with process in California and has not appeared in said action,

(1) do Sections 412-413 of the California Code of Civil Procedure violate the Fourteenth Amendment to the Federal Constitution insofar as they purport to confer jurisdiction on a California court, to adjudicate said claim?; and

(2) is it a violation of said Amendment for a California court to exercise jurisdiction to determine said claim?

B. Where plaintiffs in an action in California claim that debtors, under contracts made in New York which obligate said debtors to make continuing payments to a New York trustee, should cease making payments to said trustee and should instead make such payments to the plaintiffs on the ground that said contracts are invalid, and said trustee has never been a resident of

California, has not been served with process in California and has not appeared in said action,

(1) do Sections 412-413 of the California Code of Civil Procedure violate the Fourteenth Amendment to the Federal Constitution insofar as they purport to confer jurisdiction on a California court to adjudicate said claim?; and

(2) is it a violation of said Amendment for a California court to exercise jurisdiction to determine said claim?

STATUTE INVOLVED

Sections 412 and 413 of the California Code of Civil Procedure, Deering's California Codes, Civil Procedure, pp. 184-185, provide as follows:

Sec. 412. "Where the person on whom service is to be made resides out of the State; or has departed from the State; or can not, after due diligence, be found within the State; or conceals himself to avoid the service of summons; or is a corporation having no officer or other person upon whom summons may be served, who, after due diligence, can be found within the State, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit or by the complaint on file, that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant or corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in

part in excluding such person or corporation from any interest therein, such court, or judge, may make an order that the service be made by the publication of the summons."

Sec. 413. "The order must direct the publication to be made in a newspaper, to be named and designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once each calendar week, but publication against a defendant residing out of the State, or absent therefrom, must be pursuant to Section 6065 of the Government Code, except in proceedings instituted pursuant to the provisions of Chapter 4, Title 3, Part 3 of this code. In case of publication, where the residence of a nonresident or absent defendant is known, the court, judge, or justice, must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post office. Service is complete upon th making of such personal service or at the expiration of the time prescribed by the order for publication, whichever event shall first occur.

"As used in this section 'post office' includes mail box, sub-post office, substation and mail chute or other like facility regularly maintained by the Government of the United States."

STATEMENT OF THE CASE

Appellees Anderson, et al, instituted an action in the California Superior Court against the American Federation of Musicians of the United States and Canada (herein called the "Federation"), phonograph record manufacturers, and Samuel R. Rosenbaum, the

trustee of a New York charitable trust created to educate the public to appreciate music and thereby to increase the employment of musicians by private employers. That trust was created in New York by agreement between said manufacturers and the trustee (to which the Federation was not a party) and, under the trust agreements, the manufacturers agreed to make continuing contributions of funds to the trust. Plaintiffs, who are a group of musicians (suing on behalf of all musicians in the United States similarly situated), differing with the Federation, the exclusive bargaining agent of musicians, as to the economic problems facing musicians, alleged that the Federation had no power to enter into collective agreements with the employers whereunder the employers agreed to create said trust and to contribute to it because, as they view the economic problems, the Federation's solution favors a majority of musicians against a minority to which plaintiffs claim to belong. They requested that the manufacturers be enjoined from making further payments to the trustee and that they be required to make said payments to the plaintiffs instead. All the agreements were made in New York and are to be construed under New York law. The Federation and most of the manufacturers have their principal offices in New York, the trustee has his sole office in New York the payments are required to be made in New York and two-thirds of the recording of phonograph records in the United States takes place in New York. The plaintiff musicians are not suing on any transaction which they have had with the trustee, but only with respect to a transaction which the companies in New York have had with the trustee in New York and on another transaction which such companies had with the Federation in New York.

Appellees Atkinson, et al, are also musicians suing as representatives of the class. They instituted suit in the same California court against the Federation, distributors to television exhibitors of old theatrical films, and said trustee (and also a large number of other companies, joined through error, which had no connection with this lawsuit). Almost all of the motion picture films here involved were made prior to 1946. After the films were made, the Federation and producers of films agreed that the films previously produced would not be exhibited on television without further agreement with the Federation. Subsequently, the Federation entered into agreements in New York, largely with distributors (almost all of whom had their principal offices in New York), who purchased these old films from the producers, under which the films were released to television. These distributors entered into agreements in New York with said trustee (to which the Federation was not a party) in which they agreed to make continuing contributions in New York to the aforementioned trust and for the same purpose. They also agreed in New York with the Federation to make new sound tracks for the television exhibitions. When the latter agreements expired, they agreed, as a substitute for making new sound tracks, to make payments to musicians who made the theatrical sound tracks (without further services by them). In June, 1955, the few agreements with the Federation then in effect were amended prospectively to provide that, with respect to motion pictures thereafter released to television, these payments to musicians would be discontinued and all payments would be made to said trustee. Agreements entered into with the Federation after June 1955 provided that all payments should be made to said trustee.

In this action, too, and for the same reasons, the plaintiffs alleged that the Federation had no power to enter into said agreements with the distributors under which the latter agreed to contribute to said trust. They requested that the distributors be enjoined from making any payments to said trustee and that they be required to make said payments to the plaintiffs. Here, too, the plaintiff musicians are not suing with respect to any transaction which they have had with the trustee. Instead, they are suing with respect to transactions between companies in New York (most of whom never employed any musicians) and the trustee in New York and between those companies and the Federation in New York.

In neither action was the trustee (who never resided within California) served with process within the State of California nor has he appeared in either action. In both actions plaintiffs moved for a temporary injunction restraining the manufacturers and distributors, respectively, from making payments to the trustee and for the appointment of a receiver. After a joint hearing on the motions in both actions, the Superior Court held (in a single opinion) on January 24, 1957, that it lacked jurisdiction to entertain said motions because of the absence of personal service on the trustee within the State of California.

Plaintiffs in each action thereupon separately petitioned the California District Court of Appeal, Second Appellate District, Division Two, for a writ of mandate directing the Superior Court in and for Los Angeles County to exercise jurisdiction over the motion in the respective actions for a temporary injunction restraining the manufacturers of phonograph records and distributors of television film, respectively,

from making payments to the trustee, and for the appointment of a receiver to collect the payments, which would, under the agreements have been payable to the trustee.

The Federation filed a brief in opposition to each petition for writ of mandate. In each brief the sole ground urged was that, under the Fourteenth Amendment to the Federal Constitution, it would be unconstitutional for the courts of the State of California to exercise jurisdiction in the action in the Superior Court, which involved conflicting claims to an intangible obligation for the payment of money undertaken by a third person.

Each brief stated the issues as follows:

> "Two issues are presented upon this Petition for a Writ of Mandate. They are (1) whether the Trustee is an indispensable party and (2) if he is, how must service upon him be effected in order to permit the Court to take action which affects his rights.
>
> "These issues are determinable under the 14th Amendment to the Federal Constitution and hence are governed by the decisions of the Supreme Court of the United States." (p. 2)

The District Court of Appeal held that due process under the Fourteenth Amendment permitted *in rem* jurisdiction to be exercised and that Section 412, California Code of Civil Procedure authorized the Superior Court to exercise *in rem* jurisdiction. It therefore directed, on April 24, 1957 (by a single judgment covering both proceedings) the issuance of the writ of mandate in each proceeding. On May 21, 1957 it issued an order correcting certain misstatements of facts in its opinion, and denying rehearing.

The real parties in interest, including the Federation, thereupon petitioned the Supreme Court of California (which petitions covered both proceedings) for a hearing.

Again, the sole ground urged by the Federation was that the California court could not, without violating the Fourteenth Amendment to the Federal Constitution, exercise jurisdiction in either of the two actions, which involved rival claims to an intangible, without personal service upon the trustee within California, since he was a claimant to the obligations arising under the contracts. The Federation's petition stated (p. 3):

> "Whether or not the process issued by a state court is adequate to confer jurisdiction over the party sought to be served constitutes a Federal Constitutional issue. As the Supreme Court of the United States held in *Pennoyer* v. *Neff*, 95 U.S. 713, 733:
>
> > 'Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction do not constitute due process of law.' "

The petition for hearing filed by Columbia Broadcasting System, Inc. and five other real parties in interest raised the question (pp. 2-3) whether:

> "a California court (in view of the Fourteenth Amendment to the United States Constitution), has power, upon the basis of substituted service of process upon the non-resident trustee, to de-

clare invalid and void the non-resident trustee's rights and obligations under such agreement . . ."

The petition for hearing filed by Loew's, Inc. and four other real parties in interest likewise raised the question (pp. 2-3) whether "under the due process clause of the United States Constitution" a court could exercise *in rem* jurisdiction over a debt to which there are adverse claimants "solely because the court has personal jurisdiction over the third party debtor?"

The Supreme Court of California held that under Sections 412-413 of the California Code of Civil Procedure, service upon the trustee in New York was adequate to give the Superior Court quasi in rem jurisdiction and that due process requirements under the Federal Constitution did not bar the exercise of that jurisdiction.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A vital question relating to the jurisdiction which a state may claim for its own courts under the due process limitation of the Fourteenth Amendment to the Federal Constitution is here presented. And the question involves a common factual situation: A person becomes obligated to another pursuant to the terms of a contract between them made in one state. A third party, claiming that the intangible debt under the contract belongs to him and should be paid to him rather than to the obligee under the contract, sues the debtor and the obligee in a second state. May a court of that second state exercise jurisdiction without personal service within the state upon the nonresident obligee, who has not appeared in the action? The Supreme Court of California has held that Sections 412 and 413 of the California Code of Civil Procedure

authorize the exercise of jurisdiction by the state court in such a situation and that the Fourteenth Amendment to the Federal Constitution is not thereby violated.

That determination is in conflict with the decision of this Court in *New York Life Ins. Co.* v. *Dunlevy*, 241 U.S. 518. In that case the Insurer issued its policy in Pennsylvania and the two rival claimants to its proceeds, Dunlevy and Gould, both resided there. The Insurer paid the policy proceeds into the registry of a Pennsylvania state court and interpleaded the two rival claimants. After the dispute arose but before the interpleader was commenced, Dunlevy moved to California and was served by publication. This Court remarked that if Dunlevy's ownership of the policy proceeds were conceded, they could be seized and applied to satisfy her obligations. However, it held that her rival claim against Gould to the proceeds could not be litigated without personal service over her. In rendering its holding that the Pennsylvania court lacked jurisdiction, this Court stated:

> "This was an attempt to bring about a final and conclusive adjudication of her personal rights, not merely to discover property and apply it to debts" (241 U.S. at 521)

California held *Dunlevy* not to be controlling here because, in that case, the debtor

> "sought to compel conflicting claimants to adjudicate their rights in a forum of his choice." (49 AC at 348),

whereas, here, it was one of the rival claimants which picked out the forum in which to litigate. Thus, California holds that while the Fourteenth Amendment

precludes a debtor, who has no interest other than to pay the proper party, from invoking the jurisdiction of a state court unless personal jurisdiction over both rival claimants is secured, but that it does not preclude either one of the rival claimants even though there is no personal jurisdiction over the other claimant.

This Court, as an alternative ground of decision, held that the rival claimant could not institute such an action without personal service on the other claimant in *Bank of Jasper* v. *First Nat. Bk.*, 258 U.S. 112, aff'g. 264 Fed. 83. There, Florida residents paid monies to a Georgia corporation, which monies were deposited in the Florida bank. That bank issued its certificate of deposit which was negotiated to a Georgia bank. The Florida residents brought an action in a Florida state court against the Florida bank and the Georgia bank, serving the latter by publication, in which they claimed that the deposits belonged to plaintiffs and not to the Georgia bank. Plaintiffs prevailed but this Court held that the Fourteenth Amendment precluded the Florida court from exercising jurisdiction. Again, this Court pointed out that if plaintiffs had claimed that the deposits belonged to the Georgia bank, they could be seized to satisfy obligations of the bank. It went on to hold, however:

> "But the suits in the state court were not of that character. In them the complainant [the Florida residents] asserted that, by reason of the fraud alleged, the Jasper Bank [the debtor] was not indebted to any of its co-respondents [the Georgia bank], but to the claimant [the Florida residents]." 258 U.S. at 119.

Thus, this Court held here that a rival claimant could not institute an action to determine ownership of the intangible without personal service on the nonresident, rival claimant. This Court then proceeded to add the additional ground that the certificates of deposit issued by the Florida bank converted the deposit into a negotiable instrument which was not within the jurisdiction of the state court. California held that the second ground constitutes the holding of the *Bank of Jasper* case and that the first is not binding upon it.

This Court made no distinction in stating the rule applicable to the rival claim situation, between suits instituted by the debtor and those instituted by one of the rival claimants, in *Estin* v. *Estin*, 334 U.S. 541, at 548 and in *Vanderbilt* v. *Vanderbilt*, 1 L. Ed. 2d 1456, 1459, and footnote 6. This Court there repeated the distinction between a claim that the nonresident owns the intangible which the plaintiff seeks to have applied to satisfy the nonresident's obligations and attempts to litigate rival claims to the intangible.

The California Supreme Court stated that it could see no sense in that distinction made by this Court:

> "between jurisdiction to take over a nonresident's claim to a chose in action admittedly his and jurisdiction to establish that it was never his." (49 AC at 347)

California thus chooses to ignore the distinction that in one case the nonresident has nothing to litigate with respect to the intangible and the presence of the property, admittedly his, before the court permits the exercise of the state's coercive power to compel him to come in and defend against the application of that property to other obligations. In the rival claim situa-

tion, the issue is to determine rights in the intangible. Since an intangible is merely a relation between people, all the people involved must be before the court for jurisdiction to exist.

Every state court of last resort (except the California Supreme Court) which has passed upon the Constitutional issue here involved has, relying on *Dunlevy*, held that a rival claimant may not institute suit to litigate his rights in the intangible without personal service upon the other rival claimant. *Redzina* v. *Provident Institution*, 96 N.J. Eq. 346, 352-353, 125 Atl. 133, 136; *Austin* v. *Royal League*, 316 Ill. 188, 147 N.E. 106, 109; *Eisner* v. *Williams*, 298 Mich. 215, 220; *Williamson* v. *Falkenhagen*, 178 Minn. 379, 227 N.W. 429.

The California Supreme Court gave two reasons in justification of its decision. First, it declared that:

> "The obligation plaintiffs seek to enforce grows out of their employment by defendants here. The payments involved are alleged to be consideration for work performed in this state. The Federation defendant is before the Court. Under these circumstances, fairness to plaintiffs demands that they be able to reach the fruits of their labors before they are removed from the state." (49 AC at 348)

The remark about "fruits of their labors before they are removed from the state" is purely figurative. An injunction would operate on the debtors because they are doing business in California, but the payments are all made in New York largely from the debtors' bank accounts in New York. Thus, the injunction, if valid, would tie up monies which never were in California, but were always in New York and are payable in New

York pursuant to the terms of contracts made in New York between parties having their principal or sole offices in New York. Of the labor currently performed, which is here involved, two-thirds are performed in New York. And the suit is not predicated upon any transaction which the plaintiffs have had with the absent trustee, nor on any transaction within the State of California. What California in effect holds is that it will protect local interests, however tenuous the local contacts and whatever the hardship or unfairness to interests outside the state. It is one of the major purposes of the Fourteenth Amendment to prevent a state from reaching out and exercising jurisdiction beyond its own borders without the presence of adequate contacts within the state. It is precisely that purpose that California seeks to defeat.

The second justification given by California is that:

> "A remedy which a federal court may provide without violating due process of law does not become unfair or unjust because it is sought in a state court instead." (49 AC at 348)

Again, California has, in this remark, failed to recognize that its jurisdiction ends at its own borders. A federal court has such jurisdiction as Congress grants and, if Congress so wills, its process may run throughout the country. Congress represents the entire nation, while each state legislature represents but the people of its own state. That difference results in many Constitutional distinctions between what the nation may do and what a state may do. There is no justification for the attempt of the California Supreme Court to do away with the distinction insofar as the jurisdiction of courts are concerned.

Thus, the decision of the Supreme Court of California is in conflict with decisions of this Court and of every other state court of last resort which has considered this Constitutional issue, and the grounds advanced by the California court to justify its result are in conflict with the purposes of the Fourteenth Amendment. The questions presented are substantial and are of public importance.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

Filed Nov. 5, 1957

L.A. 24629

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE (PETE) CARPENTER, RUSSELL A. CHEEVER, HARRIET CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated, *Petitioners,*

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, *Respondent.*

AMERICAN FEDERATION OF MUSICIANS, COLUMBIA BROADCASTING SYSTEM, et al., and LOEWS INCORPORATED, REPUBLIC PICTURES, et al., *Real Parties in Interest.*

L.A. 24630

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER, GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated, *Petitioners,*

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, *Respondent.*

AMERICAN FEDERATION OF MUSICIANS, COLUMBIA BROADCASTING SYSTEM, et al., and LOEWS INCORPORATED, REPUBLIC PICTURES, et al., *Real Parties in Interest.*

Separate class actions were brought by two groups of musicians attacking the validity of collective bargaining contracts between their employers and the American Federation of Musicians and certain trust agreements related

thereto. One action is on behalf of the employees of various motion picture companies and the other is on behalf of the employees of various phonograph record companies. The gist of plaintiffs' complaints is that in violation of its duty as their collective bargaining agent and in fraud of their rights the Federation contracted with the employers that certain royalty payments and payments for reuse of motion pictures on television should be paid to a trustee for specified trust purposes instead of to the employees.

Plaintiffs allege that these payments constitute wages earned by the employees and that their diversion to the trust is violative of their rights; that the purpose of the trust is to contribute to the public knowledge and appreciation of music throughout the United States and Canada, and the trustee is authorized and directed to expend the trust funds in presenting personal performances by instrumental musicians to which the public is admitted without charge; that the trust arrangement diverts wages earned by California employees, members of Local No. 47, for the benefit of Federation members elsewhere without corresponding benefit to plaintiffs from the operation of similar arrangements made elsewhere; that the employers are willing to make the payments to their employees, but for their agreements with the Federation to make the payments to the trustee; and that the national executive officers of the Federation insisted on this arrangement for the selfish purpose of perpetuating themselves in office and of maintaining their hold and control over the affairs of the Federation and used the trust fund to win the support of officials of the Federation's locals and member musicians throughout the United States and Canada, who vastly outnumber plaintiffs and are not employed by the employers here involved.

In each action, the Federation, the trustee, and the respective employers are named as defendants. Plaintiffs

seek a declaration of the invalidity of the collective bargaining agreement and their right to the payments either as beneficiaries of a constructive trust or on the ground that the payments constitute wages withheld in violation of sections 222 and 224 of the Labor Code. They also seek damages against the Federation for breach of its duty to them. At the commencement of the actions they moved for the appointment of a receiver to collect the payments and preliminary injunctions to prevent the employers from making the payments to the trustee. The employers have been personally served with process in this state, and personal jurisdiction has been obtained over the Federation. The trustee was served pursuant to court order by delivery of summonses and complaints and motion papers within the State of New York, but he has not appeared.

The trial court held that insofar as plaintiffs sought to intercept the delivery of payments to the trustee by the appointment of a receiver and temporary injunctions, the trustee was an indispensable party and that the court had no jurisdiction to grant plaintiffs' motions for provisional relief without personal jurisdiction over the trustee. It was careful to point out that its ruling was based solely on lack of jurisdiction and stated that "if the court had jurisdiction to do so, the exercise of a sound discretion would probably require the granting of a preliminary injunction and perhaps the appointment of a receiver. . . ."

Some of the plaintiffs in each of the actions then filed their petitions for writs of mandate in the District Court of Appeal, Second Appellate District. The Second Division of that court issued alternative writs of mandate and after a hearing filed its decision in each case "commanding respondent superior court to assume and exercise jurisdiction over petitioners' application for preliminary injunction and appointment of receiver as prayed herein."

Petitions for hearing by the real parties in interest, the defendant employers and Federation, were then granted by this court.

The writ of mandate is an appropriate remedy unless an appeal from each order denying the motion for a preliminary injunction constitutes "a plain, speedy, and adequate remedy." (Code Civ. Proc., § 1086; Financial Indem. Co. v. Superior Court, 45 Cal. 2d 395, 399.) Petitioners alleged in their petitions before the District Court that the remedy by appeal was not adequate because of the necessity of prompt action to prevent further movement of funds out of the jurisdiction of the superior court. Since no purpose but delay would be served at this time by reviewing the District Court's decision that the remedy by appeal was inadequate, we accept it for the purposes of these proceedings. (Bowles v. Superior Court, 44 Cal. 2d 574, 582.)

We have concluded that personal service upon the trustee in New York was sufficient to give the court jurisdiction to adjudicate his right to receive payments under the contracts here involved. Code of Civil Procedure section 412 provides: "Where the person on whom service is to be made resides out of the State . . . and it . . . appears . . . that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant . . . has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consist wholly or in part in excluding such person . . . from any interest therein, such court, or judge, may make an order that the service be made by the publication of the summons." Section 413 provides that personal service outside the state is equivalent to publication. Plaintiffs claim that the employers' obligation to make the payments involved is one owing to them instead of to the trustee. That obligation is a chose in action and is therefore personal property within the meaning of the

statutory provisions. (Code Civ. Proc., § 17 (3).) Being an intangible, it has no situs in fact. "An intangible, unlike real or tangible personal property, has no physical characteristics that would serve as a basis for assigning it to a particular locality. The location assigned to it depends on what action is to be taken with reference to it." (Estate of Waits, 23 Cal. 2d 676, 680.) The question presented, therefore, is whether the chose in action in question may be treated as being within this state within the meaning of section 412 for purposes of exercising in rem or quasi in rem jurisdiction over it in these actions.

Plaintiffs rely on cases holding that having jurisdiction over the obligor, the state has power to enforce the obligation and cut off the right, if any, of a nonresident claimant thereto without personal jurisdiction over the nonresident. Garnishment proceedings (Harris v. Balk, 198 U.S. 215) and escheat proceedings (Standard Oil Co. v. New Jersey, 341 U.S. 428; Security Bank v. California, 263 U.S. 282) are examples of the exercise of such power. Defendants contend, however, that in the case of ordinary choses in action such power is limited to situations in which the local claimant admits the validity of the local debtor's obligation to the nonresident and seeks to reach the interest he admits is the property of the nonresident. They point out that in the present case plaintiffs are not seeking to reach property admittedly belonging to the trustee but are claiming that the obligation is owed only to them. Defendants rely on cases holding that the debtor cannot treat his own obligation as property where he is, when his purpose is to terminate a nonresident's claim against him (Vanderbilt v. Vanderbilt, 77 Sup. Ct. 1360; Estin v. Estin, 334 U.S. 541), and they contend that the rule is the same when the debtor seeks to interplead both a local and nonresident claimant. (N. Y. Life Ins. Co. v. Dunlevy, 241 U.S. 518.) In their view it is immaterial in an action to adjudicate conflicting claims to an obligation,

whether the action is commenced by the obligor, where only one of the claimants can be served, or is commenced by one of the claimants, where he can secure personal jurisdiction over the obligor but not over the rival claimant.

We find no controlling precedent of the United States Supreme Court. It is true that in the Dunlevy case creditors of one of the claimants to the insurance proceeds had garnisheed Mrs. Dunlevy's interest before the insurance company sought to interplead the local claimants with Mrs. Dunlevy who was absent, but the Court was careful to point out that the interpleader action "initiated by the company was an altogether different matter" from the garnishment proceedings and that under the applicable state law a judgment exonerating the garnishee was not binding on the absent debtor whose claim against the garnishee the local creditors had unsuccessfully attempted to reach. (241 U.S. 518, 520-521.) Defendants rely on language in Bank of Jasper v. First National Bank, 258 U.S. 112, 118-119, suggesting a distinction for jurisdictional purposes between an action to reach a debt owed an absent defendant and an action seeking to establish that the debt is owed directly to the plaintiff instead of to the absent claimant. In the Bank of Jasper case, however, the obligation had been embodied in a negotiable certificate of deposit that was not within the jurisdiction of the court, and the Supreme Court summarized its holding by stating that "As neither the certificates of deposit nor the holder thereof were within the State of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder." Accordingly, that case is not controlling here where the obligation has not been embodied in a negotiable document.

Decisions of other courts involving conflicting claims to choses in action, where the action has been commenced by one claimant who has secured personal jurisdiction

over the debtor but not over the absent claimant, are in conflict as to whether there is jurisdiction to adjudicate the absent claimant's rights. See, e.g., sustaining or indicating jurisdiction: Cameron v. Penn. Mut. Life Ins. Co. [N. J. Eq.], 161 Atl. 55, 60; 173 Atl. 344, 346; Ely v. Hartford Life Ins. Co. [Ky.], 110 S.W. 265, 268; State v. Mueller [Mo. App.], 90 S.W. 2d 171, 174-176; Omaha Nat. Bank v. Federal Reserve Bank, 26 Fed. 2d 884, 887-889; Feuchtwanger v. Central Hanover Bank & Trust Co. [N. Y.], 43 N.E. 2d 434, 435; First Nat. Bank v. Bank of Horatio [Ark.], 255 S.W. 881, 882; Taylor v. Security Mut. Life Ins. Co., 77 N.Y.S. 1012, 1013; Oishei v. Pennsylvania R. Co., 102 N.Y.S. 368, 371, aff'd, 85 N.E. 1113; Morgan v. Mutual Benefit Life Ins. Co. [N. Y.], 82 N.E. 438, 441; Kumor v. Scottish Union & National Ins. Co. [Wyo.], 33 Pac. 2d 916, 920-922; Bush v. Missouri State Life Ins. Co. [Okla.], 207 Pac. 317, 319; Mutual Home Ass'n v. Zwatchka [Tex. Civ. App.], 297 S.W. 317, 318; Perry v. Young [Tenn.], 182 S.W. 577, 578; Sherman Nat. Bank v. Shubert Theatrical Co., 238 Fed. 225, 229; Morgan v. Mutual etc. Ins. Co., 16 Cal. App. 85. 90-93. Denying or indicating no jurisdiction: Mahr et al v. N.U.F. Ins. Soc., 127 N.Y. 452, 460-462; Kelly v. Norwich Union Fire Ins. Co. [Iowa], 47 N.W. 986, 987; Royal Neighbors of America v. Fletcher [Okla.], 227 Pac. 426, 429; Cross v. Armstrong [Ohio], 10 N.E. 160, 164-166; Washington Life Ins. Co. v. Gooding [Tex. Civ. App.], 49 S.W. 123, 127; Redzina v. Provident Inst. for Savings [N. J.], 125 Atl. 133, 136; McBride v. Garland [N. J. Eq.], 104 Atl. 435, 436; Austin v. Royal League [Ill.], 147 N.E. 106, 109; Schoenholz v. New York Life Ins. Co., 188 N.Y.S. 596; Eisner v. Williams [Mich.], 298 N.W. 507, 509-510; Stockbridge v. Phoenix Mut. Life Ins. Co., 193 Fed. 558, 560.)

In the absence of a settled rule governing the situation before us, and in light of the fact that an intangible may be subjected to the jurisdiction of the court without personal jurisdiction over all of the parties involved for some

purposes but not for others, we conclude that the solution must be sought in the general principles governing jurisdiction over persons and property rather than in an attempt to assign a fictional situs to intangibles.

It is significant that with respect to jurisdiction to tax intangibles (Curry v. McCanless, 307 U.S. 357, 373-374), jurisdiction over foreign corporations (Internat. Shoe Co. v. Washington, 326 U.S. 310, 316; Perkins v. Benguet Mining Co., 342 U.S. 347, 445), and jurisdiction to adjudicate trust obligations (Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 311-313), emphasis is no longer placed on actual or physical presence but on the bearing that local contacts have to the question of overall fair play and substantial justice. A similar change in emphasis has been taking place with respect to personal jurisdiction over individuals. (Cf., Pennoyer v. Neff, 95 U.S. 714; with Milliken v. Meyer, 311 U.S. 457, 462-463; Hess v. Pawloski, 274 U.S. 352; Allen v. Superior Court, 41 Cal. 2d 306, 310-313; Nelson v. Miller [Ill.], 143 N.E. 2d 673; see, Smyth v. Twin State Improvement Corp. [Vt.], 80 Atl. 2d 664.) "But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Internat. Shoe Co. v. Washington, supra, 326 U.S. 310, 316.)

In the present case, since the trustee is not and has not been a resident of California, section 417 of the Code of Civil Procedure precludes the entry of a personal judgment against him, and it is therefore unnecessary to determine whether his activities as trustee have sufficient connection with this state constitutionally to justify an assumption of personal jurisdiction without service or proc-

ess here. The relevant contacts with this state are significant, however, in deciding whether due process permits exercising a more limited or quasi in rem jurisdiction to determine his and plaintiffs' interests in the intangibles in question.

We find no relevance in the distinction defendants seek to make between jurisdiction to take over a nonresident's claim to a chose in action admittedly his and jurisdiction to establish that it was never his. In both situations the nonresident can protect his interest in the property only by submitting to the jurisdiction of the court. It is true that in the former situation he must litigate a controversy solely between himself and his creditor unrelated to pre-existing rights in the obligation garnished, whereas in the latter situation pre-existing conflicting rights to the obligation itself are involved; but this distinction alone has no bearing on the fairness of making him appear. It has been rejected in a case involving both real and personal property including intangibles (Loaiza v. Superior Court, 85 Cal. 11, 34-35), and does not exist with respect to controversies over corporate stock. (Jellenik v. Huron Copper Mining Co., 177 U.S. 1, 12-13; Wait v. Kern River Mining etc. Co., 157 Cal. 16, 21; Amparo Mining Co. v. Fidelity Trust Co. [N. J.], 73 Atl. 249, 250-251; Michigan Trust Co. v. Probasco [Ind. App.], 63 N.E. 255, 257.) It is true that for some purposes the state of incorporation may be peculiarly appropriate for the purpose of litigating conflicting claims to corporate stock, but if so, it is because of relevant contacts there; if such contacts exist elsewhere, jurisdiction also follows. (Wait v. Kern River Mining etc. Co., supra, 157 Cal. 16, 21.) Similarly, in the case of other intangibles, jurisdiction must be determined in the light of the totality of contacts with the state involved. Indeed, many of the apparently conflicting decisions on the question before us could be reconciled on their facts, if not their language, on this basis. (Cf., e.g., Omaha Nat. Bank v. Federal Reserve Bank, 26 Fed. 2d

884, 887, 889; Feuchtwanger v. Central Hanover Bank & Trust Co. [N. Y.], 43 N.E. 2d 434, 435; First Nat. Bank v. Bank of Horatio [Ark.], 255 S.W. 881, 882; Morgan v. Mutual Benefit Life Ins. Co. [N.Y.], 82 N.E. 438, 440-441; Kumor v. Scottish Union & National Ins. Co. [Wyo.], 33 Pac. 2d 916, 920-922; Perry v. Young [Tenn.], 182 S.W. 577, 578; with Maur et al v. N.U.F. Ins. Soc., 127 N.Y. 452, 460-462; Cross v. Armstrong [Ohio], 10 N.E. 160, 164; Eisner v. Williams [Mich.], 298 N.W. 507, 509-510.)

The present case is not one in which an obligor has invoked the jurisdiction of a court remote from the obligee solely for the purpose of terminating his obligation (see, Estin v. Estin, supra; Vanderbilt v. Vanderbilt, supra) or sought to compel conflicting claimants to adjudicate their rights in a forum of his own choice. (See, N. Y. Life Ins. Co. v. Dunlevy, supra.) The obligation plaintiffs seek to enforce grows out of their employment by defendants here. The payments involved are alleged to be consideration for work performed in this state. The Federation defendant is before the court. Under these circumstances, fairness to plaintiffs demands that they be able to reach the fruits of their labors before they are removed from the state. Moreover, fairness to the defendants who are personally before the court also demands that the conflicting claims of the trustee be subject to final adjudication. Even if we were to hold that his absence prevents the granting of the provisional remedies here sought, plaintiffs would not be foreclosed thereby from asserting that payment to him did not discharge the employers' obligation to them and that the Federation was independently liable for damages for breach of its fiduciary duty. The evil of exposing the obligor to actions to enforce the same obligation in two jurisdictions with the attendant risk of double liability would not be obviated. It was just such double liability that was sustained in the Dunlevy case and gave impetus to the passage of federal interpleader legislation. (See, Chafee, Interstate Interpleader, 33 Yale L. J. 685, 711.)

It is doubtful whether today the United States Supreme Court would deny to a state court the interstate interpleader jurisdiction that federal courts may exercise. A remedy that a federal court may provide without violating due process of law does not become unfair or unjust because it is sought in a state court instead. To sustain jurisdiction in these cases, however, we are not required to forecast the overruling of the Dunlevy case and to act on that basis. For the reasons stated above, this case is clearly distinguishable from the Dunlevy case, and the multiple contacts with this state fully sustain the jurisdiction of the superior court to exercise quasi in rem jurisdiction over the intangibles in question.

Let the writ of mandate issue in each case commanding respondent superior court to assume and exercise jurisdiction over petitioners' application for a preliminary injunction and the appointment of a receiver as prayed herein.

TRAYNOR, J.

We Concur:

GIBSON, C. J.
SHENK, J.
CARTER, J.
SCHAUER, J.
SPENCE, J.
MCCOMB, J.

[Civ. No. 22272. Second Dist., Div. Two. Apr. 24, 1957.]

WILLIAM ATKINSON et al., *Petitioners*,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, *Respondent*.

[Civ No. 22273. Second Dist., Div. Two. Apr. 24, 1957.]

JOHN H. ANDERSON, JR., *et al.*, *Petitioners*,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, *Respondent*.

(1) Mandamus—To Courts.—Mandamus is appropriate to compel the superior court to assume and exercise jurisdiction with respect to applications for preliminary injunction and appointment of a receiver.

(2) Process—Service by Publication—Nonresidents.—Due process is accorded a nonresident defendant whose property, situated within the forum of suit, is seized by the court, actually or constructively, either as the object of the action or in a proceeding ancillary thereto, when he is served by publication in such manner as to be calculated to give him reasonable notice of the opportunity and necessity of appearing and defending.

(3) Constitutional Law—Due Process.—The fundamental requisite of due process in judicial proceedings is opportunity to be heard.

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(2) See Cal. Jur., Process, Notices and Papers, § 25; Am. Jur., Process, § 73 et seq.

(3) See Cal. Jur. 2d, Constitutional Law, § 303 et seq.; Am. Jur., Constitutional Law, § 567 et seq.

McK. Dig. References: (1) Mandamus, §§ 44, 65; (2) Process, § 33; (3) Constitutional Law, § 169; (4) Constitutional Law, § 35; (5) Judgments, § 7(1); (6) Judgments, § 7(3); (7, 10-12, 15) Conflict of Laws, § 18; (8, 9) Process, § 27; (13, 14) Property, § 1.

(4) Id.—Service by Publication—Jurisdiction Acquired.—Jurisdiction acquired through substituted service extends only to property seized in the *forum rei sitae*, and if the action is originally *in personam*, a seizure, such as an attachment, converts it into one *quasi in rem* on failure of the nonresident defendant to appear, and narrows the proceeding to one directed at disposition of the property so drawn into the court's custody.

(5) Judgments — Prerequisites — Jurisdiction and process.—A nonresident's property within the court's jurisdiction and seized by the court, either as the object of the action or in an ancillary proceeding, is subject to the ensuing judgment, regardless of the fact that the nonresident may be an indispensable party or that he may have been served constructively.

(6a, 6b) Id.—Judgments on Substituted Service—Jurisdiction Over Res.—A debt owing by resident employers of musicians payable, under a labor agreement, to a nonresident trustee who had no apparent interest in the litigation except for his fees, and who refused to appear, constituted a sufficient res in this jurisdiction to sustain an order or judgment based on substituted service on the trustee in a controversy over ownership of that debt between the employees and employers, particularly where the convenience of all real parties in interest would be promoted by completion of the litigation in this jurisdiction, in which they reside and in which most of the documentary evidence and witnesses seem to be available.

(7) Conflict of Laws—Personal Property—Situs.—Being incorporeal, a debt is intrinsically incapable of a situs in fact.

(8) Process—Service by Publication—Adequacy.—The situs attributed to an intangible depends on what action

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(7) See Cal. Jur. 2d, Conflict of Laws, § 42 et seq.; Am. Jur., Conflict of Laws, § 65 et seq.

is to be taken with reference to it, and thus the adequacy of substituted service, so far as due process is concerned and with relation to the acquisition of jurisdiction over such intangible, is dependent on whether the form of service employed is reasonably calculated to give defendant actual notice of the proceedings and opportunity to be heard.

(9) Id.—Service by Publication—When Allowable.—A debtor can not select a remote forum, effect substituted service on his creditor and terminate his obligation through a judgment rendered at a place in which the creditor is not able to assert his rights.

(10) Conflict of Laws—Personal Property—Situs.—Once it is recognized that the doctrine that gives a particular situs to an intangible is a fiction created to meet the needs of practical justice, it must be further conceded that recognition of a special or segregated fund as a *res* is but one of the steps in the process of transition from corporeal to incorporeal property in the field of situs.

(11) Id.—Personal Property—Situs.—The presence of a special or segregated fund may be an aid, but it is not a *sine qua non* to recognition of situs of a debt at the domicile of the debtor, not only for the purpose of attachment or garnishment, but also as a jurisdictional predicate in any other situation in which the requirements of substantial justice demand recognition of such local situs.

(12) Id.—Personal Property—Situs.—The word "debt" when used in discussion of situs, necessarily includes the right of enforcement of the obligation which enforcement can occur only at the debtor's domicile or in such other place as service of process may be had on him, but it does not follow that it must be a recognized right, since a disputed claim may fall in the same category.

(13) Property—Choses in Action.—The right to recover a debt is a chose in action.

(14) Id.—Choses in Action.—A chose in action is a right which cannot be enforced without action, to receive or recover a debt or money, or damages for breach of contract or for a tort connected with a contract.

(15) Conflict of Laws—Personal Property—Situs.—Where situs is concerned, the obligation to pay and the right to collect are equivalents which reside at the place of available process on the debtor.

PROCEEDINGS in mandamus to compel the Superior Court of Los Angeles County to assume and exercise jurisdiction with respect to applications for preliminary injunction and appointment of receiver. Writ granted.

John W. Preston, Harold A. Fendler and Daniel A. Weber for Petitioners.

O'Melveny & Myers, Homer I. Mitchell, Charles C. Bakaly, Jr., Bodkin, Breslin & Luddy, Mitchell, Silberberg & Knupp, Loeb & Loeb and Averill C. Pasarow for Real Parties in Interest.

ASHBURN, J.—These petitions for writ of mandate present the same legal questions and were heard together, as were the actions in the superior court from which the present applications stem.

They deal with the elastic fictional concept of a jurisdictional res consisting of a debt or contract obligation, and require the determination of the situs to be imputed to it.

The claim of plaintiffs in each action is that defendant American Federation of Musicans of the United States and Canada, an international labor union, acting as their exclusive bargaining agent defrauded them by making agreements with their employers which divert to one Samuel R. Rosenbaum, as trustee, moneys earned and owing to plaintiffs as wages for services rendered. The trial court held that Rosenbaum, as trustee, is an indispensable party to

each action and, as he has not been served personally in this state, the court has no jurisdiction to grant a preliminary injunction or appoint a receiver as a means of sequestering and ultimately determining title to certain moneys confessedly owing by defendant employers and under their agreements payable to said Rosenbaum as trustee.

ATKINSON COMPLAINT

The Atkinson case is a representative action brought by 22 instrumental musicians on behalf of all such employees (about 2,400 in number) presently or previously hired by defendant motion picture companies. Defendants comprise four classes, (1) American Federation of Musicians of the United States and Canada (hereinafter designated as Federation), (2) numerous motion picture producing companies, e.g., Paramount Pictures Corporation, Loew's Incorporated; Republic Productions, Inc.; Republic Pictures Corporation, (3) numerous corporations engaged in telecasting motion pictures, and (4) Samuel R. Rosenbaum, as trustee.

It is alleged that defendant Federation is an international labor union, that plaintiffs are members of same and of its local known as Musicians' Mutual Protective Association Local No. 47, A. F of M.; that plaintiffs and those whom they represent are and were employed by defendant motion picture companies as musicians in production of pictures; that Federation is and was their exclusive bargaining agent and as such negotiated with employers the agreements involved in the action. Such agreements were made in 1952 and 1954 and provided that in the event of reuse of any motion pictures on television the employer should make certain "re-use payments" (as the pleader designates them) directly to the employee musicians of various classes, viz., $25 to a musician, $50 to a leader, $50 to a contractor, $75 to an arranger, and $25 to a copyist. Such reuse payments were intended and under-

stood to be "additional wages or compensation to the musicians involved."

Contemporaneously with said 1952 and 1954 agreements the defendant motion picture companies were required by Federation to enter into trust agreements with said Rosenbaum, as trustee, which required them to pay to him in that capacity 5 per cent of the gross revenues from the use of motion pictures on television (designated in the complaint as "royalty payments"), which said moneys were to constitute a "Music Performance Trust Fund" and be used in arranging the presentation of personal performances by instrumental musicians in such areas throughout the United States and Canada as in the judgment of the trustee would contribute to public knowledge and appreciation of music.

Reuse payments were made to the individual employees until June, 1955, when an amendatory agreement was made by Federation with the employer companies. This was done pursuant to resolution of the International Executive Board of Federation authorizing the president, James C. Petrillo, "to take such measures as he might deem fit to cause to be diverted from the plaintiffs to said trust fund the re-use payments aforesaid, upon the ostensible or alleged ground that the musicians who rendered their services in such motion pictures could not be located, well knowing that in truth and in fact said excuse was untrue and a sham, pretense and contrivance adopted by the Federation to effectuate their aims, purposes and intentions aforesaid and hereinafter alleged."[1] The 1955 agreement thus procured worked a diversion of all ac-

[1] The returns to the petitions for mandate in this court are demurrers; hence we must accept as true for present purposes all allegations of each petition; this is also true of each complaint below, for the presence or absence of a res in this jurisdiction must be determined from an inspection of plaintiffs' pleading (13 Cal. Jur. 2d, § 52, p. 538).

crued and future reuse payments into the trust fund held by Rosenbaum and above described. It is alleged that "Petrillo and the International Executive Board were actuated by the selfish aim and purpose of perpetuating themselves in office and of maintaining their hold and control over the affairs of the Federation; and in furtherance thereof, used the medium of such trust fund payments to win the support of officials of the Federation's locals and member musicians throughout the United States and Canada, who vastly outnumber the plaintiffs and who were not and are not employed by the motion picture companies, and who make little or no contribution whatever to said trust fund, but who nevertheless benefit as recipients of the trust fund payments made or to be made by the defendant trustee, and whose continued support was and is courted and coveted by Petrillo and the International Executive Board at plaintiff's expense in the manner aforesaid." Approximately $1,495,000 in reuse payments have been diverted from plaintiffs into said trust fund since June 15, 1955, and another $5,000,000 will be so diverted unless injunctive relief is granted, so it is alleged. The reuse payments received by the trustee average $175,000 a month. The trust instrument requires that 90 per cent of the existing fund, not already budgeted for expenditure, be disbursed during each period of 12 months. The number of musicians entitled to said reuse payments is approximately 2,400, and they comprise less than one per cent of the total Federation membership. "The entire membership of the Federation consists of approximately 260,000 members. Of this number, not more than 53,000 or less than 21% of the membership of the Federation depend for a livelihood solely upon musical employment and more than 50% of the total membership are not dependent wholly or in part, upon such employment; 35% or 88,000 depend for a livelihood entirely on non-musical activities; and 15.4% or 39,000 are fully retired."

Plaintiffs complain that a fraud has been committed upon them by their agent and a constructive trust in their favor exists with respect to moneys now due from defendant companies and remaining unpaid.[2] The petition avers that various companies stipulated at the hearing below that substantial sums of money owing by them had accrued prior to December 31, 1956, and remained unpaid. Also that Republic Productions, Inc., and Republic Pictures Corporation, conceded that the sum of $67,000 for reuse payments had accrued under their agreements, together with another $126,000 under the trust agreement, assuming its validity (apparently referring to "royalty payments"). All such moneys are payable under the agreement to trustee Rosenbaum who maintains his office in New York City and deposits all receipts in eastern and Canadian banks, none of it in California. The first cause of action[3] seeks declaratory judgment: "Declaring that the provisions thereof requiring the making of such re-use payments and royalty payments to the trust fund and the diversion thereof to the defendant trustee to be invalid and unlawful, including any and all proceedings and measures taken by the defendants in pursuance thereof; . . . Enjoining the defendant motion picture companies and television users from making any further wage increase payments or royalty payments to said trust fund or the defendant trustee; and requiring that the same be paid to those of the plaintiffs who are entitled thereto, or in the case of any deceased musician, to his widow or estate; . . . Requiring that during the pendency of this action

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[2] "The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents." (*Ford Motor Company* v. *Huffman*, 345 U. S. 330, 338 [73 S. Ct. 681, 97 L. Ed. 1048].) See also *Upholsterers' Intl. Union* v. *Leathercraft Furniture Co.*, 82 F. Supp. 570, 574.

[3] Other counts seeking recovery under sections 222 and 224, Labor Code, recovery of money on common counts and the like, do not enter into the problem presented by the first cause of action.

any and all such re-use payments or royalty payments in the possession, custody or control of the defendant trustee, or any which may be due or accrue hereafter be impounded; and that the defendant trustee and defendant motion picture companies and television users transmit the same to a receiver to be appointed by the Court for such purposes, or to pay the same directly into Court." Forty-seven defendant California corporations, 24 corporate defendants doing business in California but organized elsewhere, and five partnerships were personally served in this state. Rosenbaum, being resident in New York, was served pursuant to court order by delivery of summons and complaint and motion papers within the State of New York. He has not appeared.

Plaintiffs immediately sought a preliminary injunction against defendant motion picture companies making any payments, then or thereafter payable, to defendant Rosenbaum and moved for the appointment of a receiver to take into possession and control all funds and moneys then payable or thereafter payable to defendant, Rosenbaum, as trustee, under any or all of the above mentioned agreements, and for other injunctive relief.

As previously stated, the trial judge held that Rosenbaum is an indispensable party, without whose presence (in the absence of personal service) an injunction or receivership cannot be granted. This for the reason that the obligation owing from a defendant company, under its agreement, for accrued reuse payments does not constitute a res within this jurisdiction sufficient to support an action *in rem*, or *quasi in rem*.

Anderson Complaint

The Anderson complaint presents the same problems. Its averments closely parallel those of Atkinson. Some 91 instrumental musicians, employed by defendant recording companies in the producing of phonograph rec-

ords, bring a representative action on behalf of about 6,000 fellow workmen similarly situated. Defendants are Federation, some 87 recording companies doing business in California, and said Rosenbaum as trustee. Plaintiffs' membership in Federation and its Local No. 47 is alleged. It is also averred that Federation, as exclusive bargaining agent for musicians engaged in making recordings, effectuated in December, 1948, an agreement with defendant recording companies for a term ending December 31, 1953, which governed wages, hours and other conditions of employment and had a specific wage scale attached thereto. As a part of said 1948 negotiation the employers were required to enter into a trust agreement with Rosenbaum which bound them to pay to him, as trustee, for use as a Music Performance Trust Fund, certain percentages of their gross revenues derived from sales of recordings ("royalty payments"), said fund to be expended in the manner described in the above résumé of the Atkinson complaint.

In January, 1954, Federation, as such exclusive bargaining agent, negotiated with the employers for the grant of wage increases for the musicians (plaintiffs and those represented by them), urging that they were entitled to increases over the existing 1948 scale; the recording companies agreed to make wage increases of 10 per cent above the existing scale for the first two years of the new agreement, plus further increases aggregating 21 per cent above the existing scale for the last three years, i.e., from January 1, 1956 until December 31, 1958. It was orally agreed that these increases be paid directly to the musicians, but when the arrangement was reduced to writing Federation required the companies to enter into a trust agreement with defendant Rosenbaum bearing date of January 1, 1954, and providing for payment of moneys representing said increased wages into a fund which was substantially the equivalent of the Music Performance Trust Fund of the Atkinson case, to be disbursed in the

same manner and for the same purposes. The petition for mandate alleges: "During the negotiations for the 1954 phonograph record labor agreement, Mr. Conkling (then Vice President of Capitol Records) testified that the employers 'recognized the need for some increase to their musician employees'; that the defendant phonograph recording companies recognized the 'need to both reward them and maintain their morale in the studio' and to provide them with incentive 'but that under no circumstances could we consider any additional contributions to the fund' (Conkling Deposition, pages 48-50), but that Petrillo, as President of the defendant Federation 'more or less laid it on the line to us' and required as a condition to not calling a strike that the same amount of money which the defendant recording companies were willing to pay to their musician-employees as wage increases 'be paid to the trust fund instead of paying it directly to the musicians' (Conkling Deposition, pages 53-55); and that solely by reason of Petrillo's demand the defendant recording companies finally agreed to the 'application to the trust fund' of the musicians' wage increases, although the amounts paid to the trust fund are still reflected on the recording companies' books as 'cost for musicians' paid out in connection with the accompaniment of recording artists (Conkling Deposition, page 61)."

Since January, 1954, said moneys have been paid to the trustee and disbursed by him, and the employers have paid the musicians under the 1948 wage scale and nothing more. Approximately $1,737,900 of "wage increase payments" have been paid to said trustee and unless enjoined the companies will pay an additional $2,250,000 of such moneys to the trustee during the term of the 1954 contract. The petition further says it was stipulated below that various defendant recording companies owed substantial sums which were then payable; Fidelity and Specialty Records, Inc., conceded that it owed $9,000 which would be payable on February 15, 1957; Liberty Records, Inc.,

stated that $10,661.64 plus $6,731.98 had accrued under the agreements for the six months' period ending December 31, 1956. Plaintiffs and the musicians represented by them in the action comprise only 2½ per cent of the membership of Federation, and receive only a minimal indirect benefit from expenditure of said funds. It is alleged that all this was an abuse of the bargaining power by Federation, a fraud upon plaintiffs. Also, that "Federation so acted with the aim and purpose of, and it pursued a plan and scheme of, utilizing and bargaining power of the class or unit for whom the Federation was bargaining, i.e., the plaintiffs in this action, and of trading away the just wage and property interests of the plaintiffs for services actually rendered and to be rendered by them, for the purpose of benefiting others than the plaintiffs through the device of such trust fund payments; and the Federation abused its said duties and responsibilities and its said fiduciary relationship toward the plaintiffs in that all of the acts, omissions, measures and conduct on the part of the Federation hereinbefore and hereinafter alleged were motivated by the Federation's hostility and opposition to the plaintiffs and their interests . . . the Federation arbitrarily decided and decides whether or when wage increments or increases which the defendant recording companies were and are prepared to pay for the plaintiffs' services shall actually be paid to the plaintiffs or to the trust fund at the plaintiffs' expense, with virtually no corresponding benefits to the plaintiffs for such losses, either in the form of trust fund payments or otherwise."

The labor agreement, paragraph 14(a), provides that a breach of the trust instrument shall at the option of Federation render "of no further force and effect for the duration of your failure to perform such obligations," any of the provisions of the labor agreement. It is also provided in the same paragraph that the Federation shall have the right at all reasonable times to "examine and

audit your records and accounts concerning all transactions involving your sale of phonograph records which you shall keep pursuant to said Trust Agreement, and such other records and accounts as may be necessary;" all to the end of verifying and "determining the amount of payments due by you thereunder."

It fairly appears from the pleadings that control over the trust is tightly held by Federation; that Mr. Rosenbaum's personal interest extends only to the matter of his own fees; that the party having beneficial interest thereunder is Federation: This is likewise true of the trust involved in the Atkinson case.

The course of this case was the same as Atkinson. It appears that 32 defendant California corporations, 32 defendants doing business in California as individuals or partnerships, and 23 defendant corporations organized elsewhere but doing business in California, have been served or can be served in this jurisdiction. The prayer of the complaint seeks judgment: "'Declaring that the provisions of said 1954 phonograph record labor agreement and 1954 phonograph record trust agreement requiring the making of such wage increase payments and royalty payments to the trust fund and the diversion thereof to the defendant trustee are invalid and unlawful; . . . Adjudging that any and all of such wage increase payments hereafter accruing in connection with, or deriving from, the rendition of any services by the plaintiffs, are and shall be the property of, and shall belong to, those of the plaintiffs who have rendered such services in connection with such phonograph recordings made pursuant to said 1954 phonograph record labor agreement, and adjudging that the plaintiffs have a property right therein." Plaintiffs sought a preliminary injunction and the appointment of a receiver, both of which were denied by the trial judge solely because of his conclusion that jurisdiction is lacking due to failure to serve defendant Rosen-

baum within the State of California. In so ruling the court said that "if the court had jurisdiction to do so, the exercise of a sound discretion would probably require the granting of a preliminary injunction and perhaps the appointment of a receiver."

THE LAW

(1) The instant petitions seek mandate commanding the superior court to assume and exercise jurisdiction with respect to the applications for preliminary injunction and appointment of a receiver. Mandamus is the appropriate remedy (*Financial Indem. Co.* v. *Superior Court*, 45 Cal. 2d 395, 399 (289 P. 2d 233)) and we therefore proceed to the merits.

(2) Since *Pennoyer* v. *Neff*, 95 U.S. 714 (24 L. Ed. 565), was decided in 1878, and indeed before that time (see *Cooper* v. *Reynolds*, (1870) 10 Wall. (U.S.) 308 (19 L. Ed. 931)), it was and has been recognized that due process (as reflected in the Fourteenth Amendment and independently thereof) has been accorded a nonresident defendant whose property, situated within the forum of suit, has been seized by the court, actually or constructively, either as the object of the action or in a proceeding such as attachment ancillary thereto, when he has been served by publication in such manner as to be calculated to give him reasonable notice of the opportunity and necessity of appearing and defending. (3) "The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard." (*Baker* v. *Baker, Eccles & Co.*, 242 U.S. 394, 403 (37 S.Ct. 152, 61 L.Ed. 386).) (4) But the jurisdiction so acquired through substituted service extends only to property thus seized in the *forum rei sitae*. If the action is originally in personam, a seizure such as an attachment converts it into one *quasi in rem* upon failure of the nonresident defendent to appear, and narrows the proceeding to one directed at disposition of the

property so drawn into the custody of the court. Quoting from the Cooper case, *supra*, *Pennoyer v. Neff*, *supra*, says at page 725: " 'If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court.

" 'But if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature a proceeding in rem, the only effect of which is to subject the property attached, to the payment of the demand which the court may find to be due to the plaintiff.' "

(5) The property within the jurisdiction and so seized is subject to the judgment and the owner is bound by it so far as disposition of that property is concerned. The fact that he is an indispensable party or that he has been served constructively becomes inconsequential.

In the instant cases the res which will sustain constructive service on defendant Rosenbaum must be found if at all, in the contractual obligation of the employer defendants and accrued payments due and to become due thereunder. It is admitted that there are substantial sums now owing by employer defendants who are within this jurisdiction, able and ready to pay the same. Witness the stipulation that the Republic defendants are holding $67,000 and $126,000 which will be paid to the trustee if the agreement so to do is held valid. (6a) The problem at bar reduces itself to the question whether a debt owing by a resident and payable to a nonresident who refuses to appear is a res within this jurisdiction of such substantiality as to support a judgment disposing of that debt upon the basis of constructive service. Defendants assert that it is not, because plaintiffs seek to establish a right to same which resides in themselves as a result of the

fraud practiced upon them and do not claim under or through the absent trustee. They assert that an attachment of the debt in an action against the absentee claimant would be valid and to the extent of that property would sustain a judgment based upon the constructive seizure. They argue that this is so because the attaching creditor claims under and through the absentee and admits he is the owner of the debt. They say that the rule does not apply when the plaintiff asserts a right in himself adverse to the nonresident claimant and seeks an adjudication that he, the plaintiff, is the true owner of the debt. The basis of the distinction is not clear on principle and rests upon a ruling of the United States Supreme Court in an interpleader suit later discussed herein (*New York L. Ins. Co.* v. *Dunlevy*, 241 U.S. 518 (36 S.Ct. 613, 60 L. Ed. 1140)). According to defendants we have a res within this jurisdiction in the one instance and no res in the other.

(7) Being incorporeal, a debt is intrinsically incapable of a situs in fact. This is generally recognized in the authorities, which by a process of inclusion and exclusion have attributed a fictional situs to the debt or refused to do so according to the demands of practical justice in specific factual situations. "An intangible, unlike real or tangible personal property, has no physical characteristics that would serve as a basis for assigning it to a particular locality. The location assigned to it depends on what action is to be taken with reference to it." (*Estate of Waits*, 23 Cal. 2d 676, 680 (146 P. 2d 5).) This last sentence explains the disparity in the decided cases.

The fictional nature of the situs of a debt has been recognized repeatedly by decisions of the United States Supreme Court which pass upon the presence or absence of due process.

Harris v, *Bulk*, 198 U.S. 215 (25 S. Ct. 625, 49 L. Ed. 1023), holds that a debt may be attached not only at the domicile of the debtor but also in any jurisdiction where

effective personal service of process may be made upon him. At page 223 the court said: "In such case the situs is unimportant. It is not a question of possession in the foreign state, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the state where the attachment is laid."

Chicago, R. I. & P. R. Co. v. *Sturm*, 174 U.S. 710, 715 (19 S. Ct. 797, 43 L. Ed. 1144): "The essential service of foreign attachment laws it to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors To do it you must go to the domicil of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*."

Propper v. *Clark*, 337 U.S. 472, 488 (69 S. Ct. 1333, 93 L. Ed. 1480). Discussing a receivership of certain royalties owed by a resident of New York to a nonresident, the court said "*Pennoyer* v. *Neff* merely holds that a personal judgment cannot be obtained against a nonresident on service by publication. It recognizes at p. 733 that for an *in rem* action it is sufficient that the property be within the state, subject to the control of the Court, and that there be some form of service which is reasonably calculated to give notice to parties whose interests may be affected by the judgment. [Citations.] The first requirement can be met in other ways than seizure of title, e.g., by an injunction against transfer of the property [citations]; by an attachment [citation]; or by personal service on the

party holding the property within the state [citations]. We have no doubt that where property is in a state and comes under the control of a court, as here by appointment of the temporary receiver, it is fair to permit substituted service."

In *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428 (71 S. Ct. 822, 95 L. Ed. 1078), it appeared that certain shares of stock in Standard Oil Company, a new Jersey corporation, and certain unpaid dividends declared thereon, had been adjudged escheated to the State because the owners and their addresses were unknown for 14 successive years. The company appealed, claiming among other things that the property had no situs in New Jersey for purpose of escheat; that since the property could not be seized or escheated the company would remain liable to its stockholders (creditors) and a requirement of payment of the dividends to the State would deny due process. The court said at page 438: "Appellant is a corporation of New Jersey, amenable to process through its designated agent at its registered office. [Citations.] This gave New Jersey power to seize the res here involved, to wit, the 'debts or demands due to the escheated estate.' . . . That power to seize the debt by jurisdiction over the debtor provides not only the basis for notice to the absent owner but also for taking over the debt from the debtor. [Citations.] It is true that fiction plays a part in the jurisprudential concept of control over intangibles. There is no fiction, however, in the fact that choses in action, stock certificates and dividends held by the corporation, are property. Whether such property has its situs with the obligor or the obligee or for some purposes with both has given rise to diverse views in this Court.

"We see no reason to doubt that where the debtor and creditor are within the jurisdiction of a court, that court has constitutional power to deal with the debt. Since choses in action have no spatial or tangible existence, con-

trol over them can 'only arise from control or power over the persons whose relationships are the source of the rights and obligations.' [Citations.] Situs of an intangible is fictional but control over parties whose judicially coerced action can make effective rights created by the chose in action enables the court with such control to dispose of the rights of the parties to the intangible. Since such power exists through the state's jurisdiction of the parties whose dealings have created the chose in action, we need not rely on the concept that the asset represented by the certificate or dividend is where the obligor is found. The rights of the owners of the stock and dividends come within the reach of the court by the notice, i.e., service by publication; the rights of the appellant by personal service. That power enables the escheating state to compel the issue of the certificates or payment of the dividends."

Security Sav. Bank v. *California,* 263 U.S. 282 (44 S. Ct. 108, 68 L. Ed. 301, 31 A.L.R. 391). Escheat of unclaimed bank deposits. The court said at page 285: "Over this intangible property the state has the same dominion that it has over tangible property." Also, at page 287: "These are generally considered proceedings strictly in rem. But whether the proceedings should be described as being in rem or as being quasi in rem is not of legal significance in this connection. In either case the essentials of jurisdiction over the deposits are that there be seizure of the res at the commencement of the suit; and reasonable notice and opportunity to be heard. [Citations.] These requirements are satisfied by the procedure prescribed in the statutes of California. There is a seizure or its equivalent. And the published summons to the depositors named as parties defendant is supplemented by the notice directed to all claimants whomsoever. Moreover, there is no constitutional objection to considering the proceeding as in personam, so far as concerns the bank; as quasi in rem, so far as concerns the depositors; and as strictly in rem, so far as concerns other claimants."

(8) It must be recognized that the situs attributed to an intangible "depends on what action is to be taken with reference to it" (*Estate of Waits, supra,* 23 Cal. 2d 676, 680), and that the adequacy of substituted service "so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him [defendant] actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice [citation] implicit in due process are satisfied." (*Milliken* v. *Meyer,* 311 U.S. 457, 463 (61 S. Ct. 339, 85 L. Ed. 278, 132 A.L.R. 1357).)

In conformity with these basic principles California statutes and cases have recognized the propriety of substituted service in cases in which plaintiff seeks to establish his right to a local asset which will be paid or delivered to a nonresident claimant unless an injunction is granted or a receiver appointed.

Section 17, subdivision 3, Code of Civil Procedure provides: "The words 'personal property' include money, goods, chattels, *things in action,* and evidences of debt." Section 412 of the same code authorizes substituted service upon a non-resident in an action "which relates to or the subject of which is real *or personal property* in this State, in which such person . . . *has or claims* a lien or *interest,* actual or contingent, therein, or in which the relief demanded consists wholly or in part in *excluding such person . . . from any interest therein . . .*" (Emphasis added.)

Loaiza v. *Superior Court,* 85 Cal. 11 (24 P. 707, 20 Am. St. Rep. 197, 9 L.R.A. 376), dealt with money and securities held in California by Loaiza as agent of two persons named Aguayos who were residents of Mexico. Two English corporations sued in the California superior court to effect a rescission of a purchase from the Aguayos of certain mining properties situate in Mexico, the rescission

being based upon alleged fraud. Loaiza and the two Aguayos were made defendants. The Aguayos being non-residents and not served in person or appearing, an order was made enjoining the transfer of the money and securities to them by Loaiza and appointing a receiver of said property. The order was challenged on certiorari as one made without jurisdiction. After discussion of *Pennoyer* v. *Neff, supra,* 95 U.S. 714, and various other authorities, the court denied the writ and said at page 34: "And the real and primary purpose of the action here under review is to determine the title and right to possession of the moneys and securities now within the jurisdiction of the court, secured from the plaintiffs in the action by fraud, under a contract which they were by law authorized to rescind, and did rescind, upon discovery of the fraud.

"Our statute says that in such a case the person who gains a thing by fraud is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. (Civ. Code, § 2224.) This being so, it cannot be that the arm of equity is so short or so weak that the fraudulent trustee,—he who has become trustee by fraud,—by remaining beyond the jurisdiction of the court, can prevent the court from seizing upon the subject of the trust within its jurisdiction, and restoring it to the defrauded *cestui que trust.*" This case was not concerned with a mere debt owing by a domiciliary because "[m]ost of those moneys, or the securities in which they have been invested, and the other things of value which were so given, are all ear-marked, so that they can be traced and identified, and were within the jurisdiction and are now within the possession of the court in which the action was brought." (P. 31.) The decision supports the proposition that determination of adverse claims to any res having situs within the jurisdiction affords proper occasion for substituted service upon an absentee claimant.

Murray v. *Murray*, 115 Cal. 266 (47 P. 37, 56 Am. St. Rep. 97, 37 L.R.A. 626), was an action for maintenance without divorce; plaintiff also sought to set aside as fraudulent certain transfers made by defendant Owen Murray to his brother, James Murray, who was also made a defendant. Both of them being absent from the jurisdiction, service was made by publication. The property involved consisted of mortgage notes and real estate. A receiver was appointed. The transfers were adjudged to be fraudulent and were set aside. Upon appeal the jurisdiction was attacked but the court upheld it upon the theory that the receiver's possession of the property was a seizure which formed valid basis for constructive service and a judgment binding that specific property. To that end the receivership was analogized to an attachment (p. 276). Here again the Supreme Court committed itself to the doctrine that determination of conflicting claims to a res found within the jurisdiction is proper though based on constructive service of the absent claimant. *Nichols* v. *Superior Court*, 1 Cal. 2d 589 (36 P. 2d 380, 95 A.L.R. 894), makes substantially the same holding, relying upon *Murray* v. *Murray*, *supra*, as good precedent.

Although the foregoing decisions had no occasion to apply their doctrine to a mere chose in action, a debt owing by a resident, that step was taken by the district court of appeal in *Standard Dredging Co.* v. *Title Ins. etc. Co.*, 96 Cal. App. 93 (273 P. 871). Title Insurance and Trust Company was trustee under an agreement securing certain collateral trust notes; the funds for redemption had been deposited with it and the land reconveyed. Plaintiff sued the title company, Mrs. Kendall Morgan and George C. Morgan, Jr., alleging that it owned certain of the notes and that they had been delivered to Morgan, Jr., as its agent; that he disobeyed his instructions and never returned the notes which came into possession of Mrs. Kendall Morgan. Plaintiff sought judgment against the title company for the amount of the funds alleged to be

owing to it (offering to give the company adequate indemnity), and served the two Morgans by publication under court order. Mrs. Kendall Morgan appeared and claimed ownership of the note and a right to the funds in the hands of the trustee. The trustee took the position that George C. Morgan, Jr. was a necessary party; "that he is not within the state of California and therefore the court has no jurisdiction of any property or any choses in action belonging to such defendant." (P. 96.) On this ground the court granted a nonsuit, which was reversed on appeal. The reviewing court relied upon *Pennington* v. *Fourth Nat. Bank*, 243 U.S. 269 (37 S. Ct. 282, 61 L. Ed. 713), among others,—a case discussed *infra*. The title company had control over an intangible, a debt owing to the owner of the notes, and the case held that that was a res within this state sufficient to sustain a valid judgment determining ownership of the same after service of the nonresident claimant by publication. At page 97 the court quotes from *Cooper* v. *Reynolds, supra*, 77 U.S. (10 Wall.) 317 (19 L. Ed. 931): " 'So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court, . . . The service of the summons on the bank is, under the doctrine thus established, the equivalent of a seizure of the property of each depositor in his account with the bank and gives the court jurisdiction over it to the same extent as in cases in garnishment and other proceedings *quasi in rem*.' " It also quotes *Security Sav. Bank* v. *California, supra*, 263 U.S. 282, as follows: " 'Seizure of the deposit is effected by the personal service made upon the bank. (*Provident Inst. for Savings* v. *Malone*, 221 U.S. 660 (34 L.R.A. N.S. 1129, 55 L. Ed. 899, 31 S. Ct. 661).) Thereby the *res* is subjected to the jurisdiction of the court.' " (See also, *McElroy* v. *McElroy*, 32 Cal. 2d 828, 831-832 (198 P. 2d 683).)

Pennington v. *Fourth Nat. Bank, supra,* 243 U.S. 269, was a divorce action in which the wife, in order to insure payment of alimony, joined the bank in which defendant had an account; the court made a preliminary injunction against the bank paying out any portion of the deposit; finally it was ordered to pay the whole thereof to plaintiff wife, and that was done. The husband later presented his check for payment, it was dishonored, and he sued the bank claiming that the orders of the divorce court were void for want of jurisdiction because he was a nonresident and had been served by publication only. This contention was rejected, the court saying in part: "The 14th Amendment did not, in guarantying due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a nonresident—of which bank deposits are an example—is property within the state. . . . The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is *an admitted indebtedness or a contested claim.* It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt,—that is, it will be valid not in personam, but as a charge to be satisfied out of the property seized." (P. 271.) (Emphasis added.)

Omaha Nat. Bank v. *Federal Reserve Bank*, (8 C.C.A.) 26 F. 2d 884. The trial court dismissed the action for want of jurisdiction, the Circuit Court of Appeals reversed and the Supreme Court denied certiorari in 278 U.S. 615. The action was brought under section 57 of the Judicial Code (28 U.S.C.A. § 118) by Omaha National Bank of Omaha, Nebraska, against Federal Reserve Bank of Kansas City, Missouri; Wyoming National Bank of Casper, Wyoming; First National Bank of Cheyenne, Wyoming, and T. E. McClintock as receiver of the last named bank. The said section deals with local actions and, as stated by the court, requires not only diversity of citizenship but another indispensable showing, namely, "that the subject-matter, the res, is within the territorial jurisdiction of the court." The court said that the purpose of the suit was to enable plaintiff "to obtain a judgment or decree that will bind the res, though the defendants are all nonresidents and cannot be personally bound unless they enter general appearance or should be served within the district." (P. 885.) Plaintiff, claiming to have been defrauded by Wyoming National Bank of Casper, and having given notice of rescission (p. 887), sought to enforce an equitable title to funds on deposit with Omaha Branch of Federal Reserve Bank of Kansas City, Missouri. The action was brought in the District of Nebraska wherein defendant Federal Reserve Bank was doing business. Plaintiff sought an injunction against payment of said deposit to the Wyoming National Bank and prayed judgment to the effect that the deposit should be paid to it. The court held that there was a constructive trust of the deposit due to the fraud in its acquisition (p. 887). It was contended that there was no res within the jurisdiction of the court. At page 888 the opinion says: "In every practical and business sense the $60,000 is there, and it is a sacrifice of substance to form to say it is not. For remedial purposes on plaintiff's bill we think the situs of any property interest in the transferred deposit was at Omaha." This language is

followed by citation and quotation of various cases, including *C.R.I. & P. Ry. Co.* v. *Sturm, supra*, 174 U.S. 710, and *Pennington* v. *Fourth Nat. Bank, supra*, 243 U.S. 269. The case is essentially four-square with the one at bar, for it recognizes a debt owing by a resident company as a res within the jurisdiction of his residence, a res which will support substituted service in an action brought and maintained for the purpose of adjudicating adverse interests thereto, one of the claimants being a nonresident.

Respondents rely principally upon *New York L. Ins. Co.* v. *Dunlevy, supra*, 241 U.S. 518. Effie J. Gould Dunlevy recovered from New York Life Insurance Company the surrender value of a life insurance policy which she claimed to have been assigned to her; the judgment was rendered by the California superior court. The insurance company claimed res judicata on the basis of a judgment rendered by a state court of Pennsylvania. The policy was a tontine which had matured and the company recognized an obligation to pay the sum of $2,479.70 to one of two adverse claimants, either Mrs. Dunlevy or her father, Joseph W. Gould. So it brought an interpleader action in Pennsylvania, deposited the money in court, personally served Gould who lived in the state, and served Mrs. Dunlevy by publication, as she resided in California. She defaulted and judgment was rendered in favor of Gould. On appeal from the later California judgment it was held that there was no res judicata because the Pennsylvania judgment was void as to Mrs. Dunlevy for want of personal jurisdiction over her. Speaking of a certain judgment which Boggs & Buhl had recovered against Mrs. Dunlevy, based on valid personal service, the court, through Mr. Justice McReynolds, said at page 520; "Beyond doubt, without the necessity of further personal service of process upon Mrs. Dunlevy the court of common pleas at Pittsburgh had ample power through garnishment proceedings to inquire whether she held a valid claim against the insurance company, and, if found to exist, then to condemn

and appropriate it so far as necessary to discharge the original judgment. Although herself outside the limits of the state, such disposition of the property would have been binding on her. . . . But the interpleader initiated by the company was an altogether different matter. This was an attempt to bring about a final and conclusive adjudication of her personal rights, not merely to discover property and apply it to debts. And unless in contemplation of law she was before the court, and required to respond to that issue, its orders and judgments in respect thereto were not binding on her. *Pennoyer* v. *Neff*, 95 U.S. 714 (24 L. Ed. 565); Shinn, Attachment & Garnishment, § 674. See *Cross* v. *Armstrong*, 44 Ohio St. 613, 623, 625 (10 N.E. 160). . . . The established general rule is that any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction, and who is not a citizen of the state, nor served with process within its borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person." It was not held that there was no res in Pennsylvania; that question was not discussed. The citation of the Ohio case of *Cross* v. *Armstrong*, 44 Ohio St. 613 (10 N.E. 160), indicates that what Mr. Justice McReynolds had in mind was the proposition that an interpleader action is essentially in personam and cannot be converted into a proceeding in rem by deposit of the disputed money in court. In the Cross case, *supra*, it is said at page 165: "The proceeding was clearly one of interpleader, and that only. We do not understand that an action *in personam* simply because a debtor brings money, the right to recover which is in contention, and gives to the custody of the court a sum sufficient to discharge his debt, changes into an action *in rem*, or that an interpleader suit is, in its nature, a proceeding *in rem*. In the Philadelphia case the company could have begun the action by original bill, and obtained a complete standing in court, if, with other proper averments, the pleader had alleged a willing-

ness to bring the money into court. Manifestly, the action thus begun would not have been *in rem*. Then, does the mere fact that the company, (the debtor,) being sued, voluntarily delivers money to the clerk of the court, rather than keep it in its own safe, or to its credit in bank, or loaned upon call, change the action from one *in personam* to one *in rem*? We think not."

The Dunlevy case has been cited from time to time as support for a rule that the presence of an intangible within the forum does not authorize a determination of the rights of the creditor thereto unless personal service is had upon him within the jurisdiction. This is exemplified by *Estin* v. *Estin*, 334 U.S. 541 (68 S. Ct. 1213, 92 L. Ed. ——, 1 A.L.R. 2d 1412), which considered the effect of a Nevada default divorce upon a previous New York decree for separation and maintenance. At page 548: "Jurisdiction over a debtor is sufficient to give the State of his domicile some control over the debt which he owes. It can, for example, levy a tax on its transfer by will [citation], appropriate it through garnishment or attachment [citations], collect it and administer it for the benefit of creditors. [Citations.] But we are aware of no power which the State of domicile of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding. The existence of any such power has been repeatedly denied. *Pennoyer* v. *Neff*, 95 U.S. 714 (24 L. Ed. 565); *Hart* v. *Sansom*, 110 U.S. 151 (28 L. Ed. 101, 3 S. Ct. 586); *New York L. Ins. Co.* v. *Dunlevy*, 241 U.S. 518 (60 L. Ed. 1140, 36 S. Ct. 613)." But general statements such as this, divorced from the actual ruling, do not advance the inquiry very far. The holding in Estin is that the husband, by taking up residence in Nevada, could not serve the wife by publication and there rid himself of his existing obligations to her through a default judgment. (9) That is but an expression of the self-evident truth that a debtor cannot select a remote forum,

effect substituted service upon his creditor and terminate his obligation through a judgment renderd at a place where the creditor is not able to assert his rights. In such a proceeding there is no res at the forum because the ends of practical justice forbid, rather than promote, extension of the fictional intangible res to the jurisdiction so selected by the plaintiff. The basic difficulty faced by the insurance company in the Dunlevy case, *supra*, was that it was attempting to select its own jurisdiction for an elimination of claims of remote nonresidents to the debt owing by it.

The actual effect of the Dunlevy holding is that a debtor cannot pick his own forum for determination of conflicting claims to the debt owed by him. The case does not hold (and the question seems not to have been presented) that one claimant cannot sequester such property at the domicile of the debtor and there determine the validity of his claim as against another claimant who is a nonresident and served by publication only. Nor does it hold that it is essential to the existence of a jurisdictional res at the domicile of the debtor that the claimant who has sequestered the debt must claim under the nominal creditor (as in attachment), rather than assert a claim in his own right.

So far as it was able to do so, and as a practical matter, Congress reversed the policy of the Dunlevy ruling of 1916 by passage of the Federal Interpleader Act in 1917 (39 Stat. 929, chap. 113), which provided a remedy for insurance companies and fraternal societies enabling them to maintain in the federal courts interpleader actions where one or more citizens, resident in the territorial jurisdiction of the court, claim adversely to one or more citizens of another state insurance moneys which the company or society concedes to be payable. The statute was amended in 1925, 1926, 1936, 1948 and 1949. In its present form (28 U.S.C.A. §§ 1335, 1397, 2361), it is available to any person, firm or corporation having money or prop-

erty of $500 or more payable to adverse claimants who are citizens of different states. (See annos. in 106 A.L.R. 626 and 17 A.L.R. 2d 741.)[4]

The Dunlevy case, *supra*, has not been applied to a situation such as that presented at bar. Although it was not cited in the opinion in *Omaha Nat. Bank* v. *Federal Reserve Bank, supra*, 26 F. 2d 884, that ruling, made in 1928, impliedly supports the view that Dunlevy does not control a controversy such as we have here.

It is interesting to note that some of the state courts have had no difficulty in finding a res within the court's jurisdiction in an action brought against a resident insurance company to determine the right to proceeds of a policy where the adverse claimant is a nonresident who has been served by publication only. See *State ex rel. Richardson* v. *Mueller*, 230 Mo. App. 962 (90 S.W. 2d 171, 174); *Oishei* v. *Pennsylvania R. R. Co.*, 117 App. Div. 110 (102 N.Y.S. 368, 371); 191 N.Y. 544 (85 N.E. 1113); *Morgan* v. *Mutual Benefit Life Ins. Co.*, 189 N.Y. 447 (82 N.E. 438, 440); *Kumor* v. *Scottish Union & Nat. Ins. Co.*, 47 Wyo. 174 (33 P. 2d 916, 920-921); *Taylor* v. *Security Mut. Life Ins. Co.*, 38 Misc. 575 (77 N.Y.S. 1012).

Respondents place considerable reliance upon *Bank of Jasper* v. *First Nat. Bank*, 258 U.S. 112 (42 S. Ct. 202, 66 L. Ed. 490). Bank of Jasper, incorporated and doing business in Florida, had received certain funds in a general deposit but had immediately issued against same certificates of deposit which absorbed the entire credit; the certificates became the property of First National Bank of Rome, Georgia. It sued the Jasper bank on these obligations and was met by the plea of res judicata based upon judgments obtained against that bank in Florida in

[4] The fear expressed by defendant employers that they will be subjected to double payment, as in the Dunlevy case, probably could have been obviated by invoking this Federal Interpleader Act.

suits brought by persons who claimed to have been defrauded and sought to impress a trust upon the debts represented by the certificates; there had been no personal service upon the Georgia bank in the State of Florida, merely constructive service followed by nonappearance of this nonresident defendant. It was held that there was no res judicata because there was no jurisdiction over the defendant or any of its property. At page 119 the court said: "The contention that the proceeds of the discounts of the notes constitute a res within the state, of which the certificates of deposit were merely evidence, rests upon a misapprehension. No specific fund was ever set apart by the Jasper bank. Its discounts resulted in general credits by the bank to the makers of the notes. . . . The credits—called deposits—so transferred, became an indebtedness of the Jasper bank to the American Company. That indebtedness, if it had rested in open account, would have been property of the creditor within the state of Florida. In an appropriate proceeding it might have been reached to satisfy a claim against its owner. *Pennington* v. *Fourth Nat. Bank*, 243 U.S. 269 (61 L. Ed. 713, L.R.A. 1917F 1159, 37 Sup. Ct. 282). But the suits in the state court were not proceedings of that character. In them the camplainant asserted that, by reason of the fraud alleged, the Jasper bank was indebted not to any of its co-respondents but to the complainant. Moreover, there was no indebtedness on open account to any of the Georgia corporations; for this account had been closed by giving certificates of deposit; and these had been transferred to the First National Bank. . . . As neither the certificates of deposit nor the holder thereof were within the state of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder."

We apprehend that the reference to a specific fund, found in this and certain other cases, does not point to a controlling factor in the problem of presence or absence of

a res. The court did not hold that a specific fund in Florida was essential to a res; it merely remarked upon the absence of one in taking the step to its further statement (probably dictum) that the indebtedness "if it had rested in open account, would have been property of the creditor within the state of Florida." The credit having been converted into a negotiable instrument which had an actual situs in Georgia, the court held that there was no res and hence no basis for a Florida judgment *in rem* or *quasi in rem*.

(10, 11) Once it is recognized that the doctrine which gives a particular situs to an intangible is a fiction created to meet the needs of practical justice it must be further conceded that the recognition of a special or segregated fund as a res is but one of the steps in the process of transition from corporeal to incorporeal property in the field of situs; that the presence of a special or segregated fund may be an aid but it is not a *sine qua non* to the recognition of situs of a debt at the domicile of the debtor,—not only for the purpose of attachment or garnishment, but also as a jurisdictional predicate in any other situation where the requirements of substantial justice demand the recognition of such local situs.

That a special or segregated fund is not of the essence of situs of an intangible is recognized in *State* v. *Security Savings Bank*, 186 Cal. 419 (199 P. 791) (affirmed in 263 U.S. 282, *supra*). Considering the question of due process in a proceeding for escheat of bank deposits, the court, after quoting the statute, said: "This language, if taken literally according to its legal significance, would be appropriate to describe money in the custody of the bank as bailee of its depositors. It is evident, however, from the context and from the purpose and object to be accomplished, that it was not intended to apply exclusively to moneys held by the bank as such custodian or bailee, although possibly it might include such special deposits.

It is not an accurate use of language to speak of the general deposits in an ordinary bank as the money of the depositors. When a general deposit is made with a bank, the title to the money delivered to it passes at once to the bank. The relation thereby established between the bank and the depositor is that of debtor and creditor and not that of bailee and bailor. The bank is the debtor and the depositor the creditor to the amount of the deposit. It is of some importance, in view of the argument presented, to note that the statutes in question do not provide for an actual seizure of any money, either before or after the judgment, but do provide, with respect to each depositor, for the payment to the state by the bank of the debt the bank owes to the depositor." (P. 423.) "The argument of the appellant on this subject is mainly based on the proposition that the proceeding authorized by section 1273 is an action *in personam* and that the judgment therein to be rendered is a personal judgment against the bank and the several depositors made defendants therein. This proposition is not maintainable. The judgment does not seek to declare or enforce any obligation of the depositors or any of them to any other person or persons. Its sole object with respect to them is to act upon the obligations they respectively hold against the bank, to effect a substitution of the state for the bank with respect to such obligation, and to transfer the title of that particular property of the depositors, respectively, to the state. Such proceedings are not proceedings strictly *in rem;* but they are proceedings *quasi in rem.* The proceeding is not in that respect distinguishable from an ordinary garnishee process against a debtor of a defendant to appropriate the debt to the payment of the plaintiff's demand. In such cases the defendant in the action may be a non-resident or not within reach of the process of the state court. But if service is made on the garnishee, the court has jurisdiction to dispose of that asset of the defendant and apply it to the payment of the plaintiff's debt." (Pp. 425-

426.) "The service of the summons on the bank is, under the doctrine thus established, the equivalent of a seizure of the property of each depositor in his account with the bank and gives the court jurisdiction over it to the same extent as in cases in garnishment and other proceedings *quasi in rem.*" (P. 427.)

Counsel for respondents argue that defendant Rosenbaum can have no property in a debt within this state unless it is conceded that the money is owed to him rather than someone else; that the obligation owed by the debtor is not property, for the chose in action consists of the right of the creditor to enforce the debtor's obligation; that unless that right be conceded there can be no property of the nonresident creditor, no res, within the jurisdiction. The argument proves too much. (12) The word "debt," when used in discussion of situs, necessarily includes the right of enforcement of the obligation, which can occur only at the domicile of the debtor or in such other place as service of process may be had upon him. But it does not follow that it must be a recognized right; a disputed claim properly may fall in the same category. The definition of personal property in subdivision 3 of section 17, Code of Civil Procedure, includes "things in action," as does section 14, subdivision 3, Civil Code, (See *Finley* v. *Winkler*, 99 Cal. App. 2d Supp. 887, 890 (222 P. 2d 345)). (13, 143) The right to recover a debt is commonly termed a chose in action, and that term is defined in Bouvier's Law Dictionary, Rawle's third revision, as "a right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action." (15) Where situs is concerned the obligation to pay and the right to collect are equivalent and they reside at the place of available process upon the debtor.

Inasmuch as our present task is to determine whether the doctrine of intangible res shall be recognized as apply-

ing to a controversy over ownership of a debt, considerations of practical justice may not be ignored. (6b) The only impediment to the exercise of jurisdiction in the instant case appears to be the unwillingness of defendant Rosenbaum who, though probably an indispensable party in a general sense, has no apparent interest in the litigation except his own fees. The convenience of all real parties in interest would be promoted by completion of the litigation in this jurisdiction where they reside and where most of the witnesses and documentary evidence seem to be available. We are persuaded that the debt owing by any respondent company constitutes a sufficient res in this jurisdiction to sustain an order or judgment based upon substituted service in a controversy over ownership of that debt, and that petitioners should prevail in these proceedings.

Let the writ of mandate issue in each case commanding respondent superior court to assume and exercise jurisdiction over petitioners' application for preliminary injunction and appointment of receiver as prayed herein.

Fox, Acting P. J., and Richards, J., pro tem,* concurred.

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*Assigned by Chairman of Judicial Council.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

No. 669,990

JOHN H. ANDERSON, JR., *et al., Plaintiffs,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, an unincorporated association and labor union, *et al., Defendants.*

No. 670348

WILLIAM (BILL) ATKINSON, *et al., Plaintiffs,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, an unincorporated association and labor union, *et al., Defendants.*

Memorandum for Counsel

A brief memorandum will be sufficient to indicate to counsel the basis of the court's determination in each case.

While there are a number of causes of action in each complaint, including claims of plaintiffs for damages as against the defendant Federation, the matters presently before the court with respect to the applications for preliminary injunctions and for appointment of a receiver fall within a narrow compass. The question first to be determined is that of jurisdiction and that problem is rooted in the contention of the plaintiffs that they, or persons whom they represent, are entitled to receive moneys payable by various defendants in the phonograph-record or television-film fields under certain agreements. The plaintiffs seek to enjoin those defendants from making payments of the moneys so claimed by the plaintiffs to the trustee of the Music Performance Trust Funds.

The trustee, Mr. Rosenbaum, although named as a party defendant in each case, cannot be personally served with process in this State, but is to be found in the State of New York. In view of that fact, does this court have jurisdiction to grant an injunction or appoint a receiver as sought by the plaintiffs? In seeking an answer to that question, some guidance is found in an article by Fletcher B. Andrews in 49 *Yale Law Journal* at page 241 (reprinted in part in *Selected Readings on Conflict of Laws* at page 306), the article being entitled "Situs of Intangibles in Suits Against Non-resident Claimants". Certain distinctions are to be noted. The cases at bar do not involve the interpleader problem (*New York Life Insurance Company* v. *Dunlevy*, 241 U.S. 518). Moreover, there is not presented a case in which a plaintiff seeks to have applied, in satisfaction of an obligation owed to him by a non-resident, property of the non-resident in the form of a debt owed the latter by a debtor upon whom the plaintiff is able to obtain personal service of process (*Harris* v. *Balk*, 198 U.S. 215). The problem is, rather, that of conflicting claims to a debt owed or an intangible obligation for the payment of money undertaken by a third person. While the authorities are not consistent and while there has been no direct determination of the question by the Supreme Court of the United States, the sound view under the facts here presented appears to be that there is no jurisdiction to resolve the conflicting claims unless jurisdiction *in personam* can be obtained over each claimant.

If the court had jurisdiction to do so, the exercise of a sound discretion would probably require the granting of a preliminary injunction and, perhaps, the appointment of a receiver, at least with respect to the 10 percent and 21 percent payments under schedule "A" of the labor agreement in the *Anderson* case, and with respect to the re-use payments in the *Atkinson* case. However, as set forth above, such jurisdiction does not exist.

Because the trustee, who is an indispensable party in the phase of each case under examination, is not subject to the process of the court, each application for a preliminary injunction and for a receiver will be denied *solely* upon the ground of lack of jurisdiction in the court. Counsel for the defendant Federation are requested to prepare a formal order in each case. The temporary restraining orders will not be dissolved until the court signs the formal orders to be submitted, or, with respect to the temporary restraining order in the *Atkinson* case, unless it shall expire prior thereto by its own terms.

Dated this 24th day of January, 1957.

JOHN J. FORD
Judge of the Superior Court

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 759

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE (PETE) CARPENTER, RUSSELL A. CHEEVER, HARRIET CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER, GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

On Appeal From the Supreme Court of California

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEALS OR TO AFFIRM THE JUDGMENTS

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IN THE

Supreme Court of the United States

October Term, 1957

No. 759

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE (PETE) CARPENTER, RUSSELL A. CHEEVER, HARRIE CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER, GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

On Appeal From the Supreme Court of California

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEALS OR TO AFFIRM THE JUDGMENTS

Appellant Federation has, in its Jurisdictional Statement, already set forth the applicable facts and legal authorities. This brief is, therefore, limited to responding to the statements and arguments which appear in appellees' motion.

Correction of the Facts

Appellees contend that this Court may on these appeals consider as facts only those allegations which appear in the complaints and in the petitions for mandate to the California District Court of Appeal. In stating the nature of the actions appellees have relied heavily upon their own unproved self-serving allegations. They also relied upon the summary of their own complaints appearing in the opinion of the District Court of Appeal, which they repeatedly denominate "factual summary in the opinion of the California District Court of Appeal", thus implying that the District Court of Appeal had made findings of fact. Actually, the District Court of Appeal purported to do no more than to summarize the complaints and, in relying upon these summaries, appellees are citing only themselves. In *Atkinson,* they concede that their version of the facts was later rejected when the California Superior Court denied, *in toto* and upon the merits, their motion for a preliminary injunction. And in *Anderson,* the same court denied on the merits the major relief sought by them (but made no findings of fact in rendering its decision).

While appellees thus seek to put blinders upon this Court's examination of the record which has been certified here, they themselves have, as we point out below, gone entirely outside the record in purporting to state the facts, and we deny the truth of the allegations so made by them.

Appellees' position, that this Court is limited to their allegations in the complaints and in the petitions for mandate is predicated upon the fact that appellant Federation demurred to their petitions. They overlook, we assume, the fact that their petitions incor-

porated by reference the entire record in the Superior Court, as it then existed. Thus, the *Anderson* petition alleged that:

> "A transcript of the oral and other evidence submitted to the respondent Superior Court, as well as the stipulations and arguments of respective counsel, is being filed with this Court and is by this reference incorporated herein." (R. Vol. 1, Petition for Writ of Mandate, p. 10)

An identical statement appears in the Petition for Mandate in *Atkinson*, pages 11-12. Hence, when the Federation demurred, its position was merely that upon the entire record, appellees were not entitled to the writ of mandate.

Anderson Case

Appellees assert that 87 phonograph recording companies were served as defendants. They go entirely outside the record to allege further that jurisdiction would not be attainable outside of California with respect to a great majority of them.

What the record does show is that more than one-third of the defendant companies were not parties to the agreements on which the complaint is founded—and this proportion assumes that in each case where the name of a defendant was similar to that of a signatory, it was the signatory that was named. Furthermore, of the signatories to the agreements, well over half have never operated. Seven companies do about 95 per cent of the domestic business and most of these have their principal offices in New York City (R. Vol. 2, Cluesmann aff. in *Anderson*, p. 16; Vol. 2, Ex. p. 5 to Kenin aff. of Jan. 2, 1957).

It is also admitted on the record that two-thirds of the phonograph records produced in the United States are recorded in New York City. The agreements involved in this litigation were negotiated and made in New York City (R. Vol. 2, Cluesmann aff. in *Anderson*, pages 2, 12). Under the agreements, the Trustee's sole office is in New York City and all payments are required to be made there, and the agreements are to be construed under New York law (R. Vol. 2, complaint, Ex. B, par. 2(h), 8).

The action brought by appellees involves the Trustee's conduct solely in New York City. Moreover, the appellees are not suing on any transaction or connection which they have had with the Trustee, but solely upon employment with defendant companies and upon their connection with the Federation.

Two sets of agreements are here involved, all of which were made in New York City. One set of agreements are the trust agreements between the Trustee and some defendant companies. The Federation is not a party to these trust agreements. Under these trust agreements, signatory companies have agreed to make specified payments to the Trustee and, in addition, to pay whatever other sums they may agree upon with the Federation.

The second set of agreements are the collective agreements between the Federation and some of defendant companies. Under these, the companies agreed to make additional payments to the Trustee, to be governed by the terms of the trust agreements. These payments are minor compared with those explicitly and directly required by the trust agreement.

Appellees, in their action, contend that the two sets of payments, both those directly made under the trust agreement and those made by cross-reference to the labor agreement, belong to appellees and not to the Trustee.

The Federation denies the allegations set forth in the Motion at pages 5-6 concerning the details of the 1953-54 negotiations, and the allegations that musicians "are still obliged to work at their 1946 wage scale." The facts are set forth in the record at Vol. 2, Cluesmann aff. In *Anderson*, pages 3-4, 12-14; see also Edelstein aff., pages 3-7.

Nor is it true that the collective agreement refers to payments to the Trustee as being for the services of the persons covered by the agreement in making recordings. The agreement states that musicians shall be paid not less than the minimum scale set forth in Exhibit "A" of the contract. Exhibit "A" contains all the provisions relating to amounts of money. It establishes not only the minimum scales but also the payments to the Trustee. Nowhere, however, are the payments to the Trustee referred to as, or made part of, the scale, nor are they anywhere in the contract designated as compensation for services.

Nor was it admitted below, as appellees assert, that payments to the Trustee are treated as a labor cost for musicians' services.

Atkinson Case

Here, appellees assert that 76 defendants have been served, but they fail to point out that the record demontstrates that only 11 of the named defendants were signatories to the contracts here involved, and

not all of these eleven have been served. (R. Vol. 3, Cluesmann aff. in *Atkinson,* p. 16; for list of signatories see Vol. 4, Transcript for Jan. 10, 1957, pp. 3-5).

Appellees again go outside the record to assert that personal service over a majority of defendant companies is attainable only in California. The Federation denies that any of the signatories cannot be served in New York.

The assertion that 97 per cent of motion picture recording giving rise to the "*diverted payments,* has taken place and *still takes place* in California" (Emphasis supplied) is without support in the record. The motion pictures here involved are not current ones since 98 per cent were produced prior to April 1946 (R. Vol. 3, Cluesmann aff. in *Atkinson,* p. 8). Moreover, the payments to the Trustee arose not from services rendered by musicians in California but from nationwide bargaining power of the Federation (Id. p. 9) and, hence, are in no sense "diverted payments."

The contractual situation is more complicated here. Motion pictures produced prior to April 1, 1946 were not subject to any restriction in the Federation agreements with respect to television use. Commencing April 1, 1946, such a restriction was imposed in an agreement negotiated and made in New York City applicable to films then owned (and previously produced) as well as those thereafter made. The purpose of this clause was to protect live employment opportunities for musicians in television broadcasting. Subsequently many producers sold their old films, and the distributors, in New York City, entered into agreements with the Federation and into separate agreements with the Trustee (R. Vol. 3, Cluesmann aff. in *Atkinson,* pages 4, 10-11).

Thus, there are here involved trust agreements between the distributors and the Trustee under which the distributors agree to make, in New York, to the Trustee, specified payments as well as such additional payments as might be agreed upon between the distributor and the Federation. The Federation is not a party to the trust agreements.

There are also agreements between the Federation and the distributors in which the Federation released films for television and the distributors agreed to make specified payments to the Trustee (in addition to those directly provided for in the trust agreements). The major payments are those directly provided for in the trust agreements. Those Federation agreements made prior to June 1955 provided for payments to the musicians who originally recorded the films, and a few of these were amended prospectively to provide for payments to the Trustee in lieu of future payments to musicians (R. Vol. 3, Cluesmann aff. in *Atkinson*, p. 16).

Appellees err in asserting that any contracts were changed by unilateral edict of the Federation or that the amendments had any retroactive operation. There not only is no proof in the record to that effect, but the uncontradicted proof is to the contrary.

In this action, too, appellees claim that the sums payable to the Trustee under the two sets of agreements with the distributors belong to them and not to the Trustee. Again, appellees are not suing on any transaction they have had with the Trustee nor on any transaction which the Trustee has had, even in part, in California.

* * *

The material which appellees include in section "D" on pages 10-12 of the Motion consists of their bare allegations, which they have been unable to prove, or consist of matters entirely outside the record, such as the references to witnesses to be called. It is evident from the actions themselves that they revolve about contracts of the Federation and of the Trustee and the negotiation of those contracts. The events involved all took place in New York and the only reasonable assumption is that most of the witnesses will be from New York.

I

THE JUDGMENTS APPEALED FROM ARE FINAL. NO VALID GROUND HAS BEEN ADVANCED TO SUPPORT THE SUGGESTION THAT THEY ARE NOT RIPE FOR REVIEW

Appellees urge that the final judgments in the mandamus proceedings are not in fact "final" because they do no more than direct the holding of hearings in other actions. It is claimed that this Court has never taken jurisdiction on appeal from judgments in such proceedings except where the mandamus judgment, for all practical purposes, ended the underlying litigation or determined the ultimate result. The authorities, however, are to the contrary.

This Court discussed the very contention made by appellees in its opinion in *Detroit & M. R. Co.* v. *Michigan* R. Com., 240 U.S. 564, at 570-571:

> "Our jurisdiction is called in question upon the ground that the judgment is not final . . . because the judgment does not determine the merits and end the litigation. But, as this court has said, 'all judgments and decrees which determine the particular cause' are final in the sense of the statute.

> (citations) This view has prevailed through a century of practice in reviewing judgments and decrees dismissing causes for want of jurisdiction or for other reasons not decisive of the merits. And it is settled that a proceeding in mandamus is an independent adversary suit, and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute."

Moreover, in other cases this Court has reviewed on appeal judgments in mandamus proceedings where the only result of the judgment was to permit the holding of a hearing on the merits, which is precisely the situation here involved. Thus, *Pacific Coast Dairy* v. *Dept. of Agriculture,* 318 U.S. 285, which arose under the same mandamus statute as the one governing the instant proceeding, involved a judgment denying a writ of mandamus to preclude the holding of a hearing. Thus, the effect of the judgment of the California Supreme Court in that case was to permit the hearing to be held on the merits. Everything which appellees say concerning a lack of finality is equally applicable to the *Pacific Coast Dairy* case, but this Court reviewed the state court judgment in that case.

Similar situations have also been present in appeals to this Court in proceedings for writs of prohibition. Where applications are made to prohibit the holding of hearings, a denial of the writ permits a hearing on the merits just as in this case and in the *Pacific Coast Dairy* case. Yet, this Court has taken appeals from such denials of writs of prohibition in *Denver & R. G. W. R. Co.* v. *Terte,* 284 U.S. 284, and in *Michigan Central R. Co.* v. *Mix,* 278 U.S. 492.

While appellees also urge a lack of ripeness for review, it is evident, upon examination, that the argu-

ment on ripeness is simply a repetition of the argument on finality of judgment. That argument has no more force by virtue of being called "lack of ripeness for review" than it had when called "lack of final judgment." Everything that appellees say about a further hearing to be held and the possibility of raising other issues at that hearing applies equally to the cases cited above in which judgments in mandamus and prohibition proceedings were held to be final despite the fact that hearings on the merits were to follow their issuance.

The cases cited by appellees (*Radio Station WOW* v. *Johnson,* 326 U.S. 120; *Republic Gas Co.* v. *Oklahoma,* 334 U.S. 62; *Cobbledick* v. *United States,* 309 U.S. 323), have no bearing at all upon the instant situation. They involved interlocutory orders in actions which had not terminated. Here, the mandamus proceedings are separate proceedings; the judgments conclude those separate proceedings and under the settled rules, they are "final." Appellees have suggested no reason why those judgments are not "ripe for review." There is no authority which holds that the possibility of the occurrence of new and unrelated issues upon the hearing on the merits in any way embarrasses the determination of the issue raised in the separate mandamus proceedings.

Nor is appellees' argument, as to the questions which would be "saved" for review following a hearing on the merits, sound. Based as it is upon *Republic Gas Co.* v. *Oklahoma,* supra, its validity is limited to situations in which the proceeding has not been finished and the order is not "final." Here, the separate proceedings have been concluded and the judgments rendered in them are "final", as we have shown above.

It is also urged by appellees that this Court ought not to review the judgment in *Atkinson* since the Superior Court has denied on the merits their motion for a preliminary injunction. The decision of the California Supreme Court was not in any way predicated upon the fact that, in the posture of case as it then stood before that Court, the Superior Court had before it an application for a preliminary injunction rather than a trial upon the merits. Its determination will be binding upon the jurisdictional issue here involved when the action comes up for trial (Cf. *Catholic Society* v. *Madison County,* 4th Cir., 74 F. 2d 848), and therefore is not "moot."

II

THE CONSTITUTIONAL ISSUE RAISED IN THE JURISDICTIONAL STATEMENT IS SUBSTANTIAL SINCE THE CALIFORNIA COURTS LACKED JURISDICTION HERE UNDER THE APPLICABLE AUTHORITIES

The claim that the California Superior Court does have jurisdiction over the actions here involved rests upon the contention that adequate contacts exist between the subject matter of the suits and the State of California, and that these contacts constitute a basis of jurisdiction under the Fourteenth Amendment to the Federal Constitution. This argument relies upon *McGee* v. *International Life Ins. Co.,* 355 U.S. 220. In that case, without personal service, a foreign insurance company was held subject to suit on an insurance policy in the state in which the insured lived, in which the insurance contract was delivered, from which the insurance premiums were mailed and in which the insured died. Jurisdiction was predicated upon a state statute rendering foreign insurers subject to suit on insurance contracts on lives within the state.

The result in that case is related, however, to the right of a state to exclude insurers from insuring lives within the state except upon conditions reasonably satisfactory to the state. The broad authority of a state over the insurance business was emphasized by this Court in *California Auto Ass'n.* v. *Maloney*, 341 U.S. 105, 110, in which this Court declared that "the power of the state is broad enough to take over the whole business [of insurance], leaving no part for private enterprise." An application of this power appears in *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643, in which this Court held that a state could exclude a foreign insurance corporation from selling insurance contracts by mail to persons within the state without first having designated its secretary of state as agent for the service of process. Even there, this Court stated that no need existed to resort to the fiction of consent in such a case. That is precisely the situation in *McGee*. The state made foreign insurers subject to suit on policies sold and covering lives within the state. The insurer came within the statute when it solicited the sale by mail and delivered the policy by mail within the state.

Here, California is not claiming jurisdiction over a foreign corporation but over an individual trustee. And appellees are not suing on any transaction they have had with the Trustee nor on any transaction which the Trustee has had, even in part, in California.

In *Anderson*, a class action has been brought on behalf of musicians casually employed in recording music for phonograph records, two-thirds of the employment being in New York City. Plaintiffs seek to invalidate trust agreements which their employers made in New York (where their main offices are located) with the

Trustee, providing for the making of payments in New York to the Trustee, and which are largely made from the employers' bank accounts in New York. They also seek to invalidate nationwide contracts made in New York between the Federation (whose principal office is in New York) and the employers, covering largely employment in New York, under which the employers agreed to make additional payments in New York to the Trustee. Employment in California was no part of performance to or by the Trustee. He was simply receiving payments to be used to educate the public to appreciate live music with the result thereby, it was hoped, having the consequence of increasing the volume of employment available for musicians.

In *Atkinson,* the situation is even more complex. Prior to 1946, musicians were employed in making motion pictures under collective agreements which did not restrict the television use of those films. On April 1, 1946, the major producers (whose principal offices were in New York) and the Federation, agreed, in New York, upon a television restriction clause which applied to stocks of old films as well as those thereafter made, and did so to protect the employment opportunities of musicians in television throughout the country. Most producers sold their films to distributors. These distributors, commencing in 1950, began making agreements in New York with the Federation to secure releases of the television restrictions. At the same time, they entered into agreements in New York with the Trustee to make payments in New York, and, for the most part, these are made from New York bank accounts. With respect to contracts with the Federation, those made after June 1955 (and a few earlier ones thereafter amended) have required addi-

tional payments to be made in New York to the Trustee.

Thus, the Trustee has taken no action with respect to which California could require its consent. He is not being sued on any transaction he has had with the plaintiffs nor on any transaction he has carried on, in any part, in California. In *Anderson,* the most that can be said is that an employee sues, within his own state, a person outside the state because that person had a transaction outside the state with the employee's employer who operates in many states, and because that person receives payments by cross-reference to a contract made outside the state between the employer and a nationwide bargaining agent. In *Atkinson,* the employee sues, within his own state, a person outside the state because that person had a transaction outside the state with a third party who had another transaction, also outside the state, with the employee's employer who operates in many states, and because that person receives payments by cross-reference to a contract made outside the state between the employer and a nationwide bargaining agent. In no case are the services of the employee any part of the consideration furnished by or to the person outside the state. The claim is only that the nationwide bargaining agent had no right to enter into its contract with the employer and no right to induce the employer to enter into his contract with the Trustee. It is because of this alleged lack of authority that plaintiffs claim jurisdiction over the Trustee.

The alleged California "contract" which the California Supreme Court saw in the situation was the right of the employees to "reach the fruits of their

labors before they are removed from the state." (Federation Juris. Stat., App. A, p. 10). Where in either case, however, was anything leaving the state? There is nothing whatever in the record to support such a conclusion. A temporary injunction and appointment of a receiver has the effect of requiring the employer, because it does business within the state, to bring into the state monies which would not otherwise be there. And, on that basis, jurisdiction is claimed over the intangible debt owing to the Trustee under the agreements; but which, the plaintiffs contend, belongs to them. There is, too, no proof, whatever, that these monies are the fruits of the plaintiffs' labor, other than their own assertions. E.g., in *Atkinson,* where almost all the films were made and the musicians were paid before the negotiation of the television restriction clause, how do the payments, made by subsequent owners of the films, become the fruits of the labor of the plaintiffs?

In *Estin* v. *Estin,* 334 U.S. 541, and in *Vanderbilt* v. *Vanderbilt,* 354 U.S. 416, this Court held that a state having one party to a marriage as its domiciliary could not, on that basis alone and without personal service upon the other, adjudicate the property rights of the spouses. Yet, the state has far more "contact" with the spouse and the litigation than California has in the actions here involved. The scope which appellees would give to *McGee* would almost wipe out the jurisdictional limitations of the Fourteenth Amendment.

California, however, disavows any personal jurisdiction over the Trustee (Id., p. 8). It claims *quasi in rem* jurisdiction, arising from its enjoining persons obligated to the Trustee from making payment to him. The payment so enjoined is termed the *res.*

However, no specific property is here involved. The signatories to the agreements simply have a general obligation to pay in New York. There are no segregated funds, and the debt is payable from the general estate of the debtors. Under these circumstances, we have pointed out in our Jurisdictional Statement, there can be no *quasi in rem* jurisdiction where the plaintiffs claim that the absent Trustee has no rights in the intangible, but, instead, that it is owned by the plaintiffs.

Appellees urge that the precedents of this Court authorize *in rem* jurisdiction over intangibles even though the claimant within the state denies the ownership of the absent claimant. However, the entire point of *Jellenik* v. *Huron Copper Mining Co.*, 177 U.S. 1, cited by them, is that shares of stock were not an intangible since they were tangible personal property under the laws of the state of incorporation. There is no doubt that a court having physical property within its jurisdiction may adjudicate rival claims therein. This does not hold true, however, with respect to intangibles.

In *Security Savings Bank* v. *California*, 263 U.S. 282, and in *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, and in *Propper* v. *Clark*, 337 U.S. 472, the plaintiffs did not deny the ownership of the absent claimant. On the contrary, they contended that the absent claimant did own the intangible and they then claimed through the absent owner. Just as in the attachment and garnishment cases (*Chicago R.R.* v. *Sturm*, 174 U.S. 710; *Harris* v. *Balk*, 198 U.S. 215, and *Pennington* v. *Fourth Nat. Bank*, 243 U.S. 269), the absent owner in these cases had nothing to litigate with respect to his ownership of the property. It was the ownership of

the absent party that the plaintiffs contended for and which they then sought to seize. The plaintiffs were not denying the existence of that ownership and seeking to have their own claims established as rivals to the absent parties. Since the ownership of the absent parties was conceded, the state had within its jurisdiction property belonging to the absentee which could be used to require the absent party to come in and litigate the other issues raised by the plaintiffs. Where, however, the ownership of the absentee is denied, there is no property belonging to him which can be used to claim jurisdiction over him, and he does have something to litigate concerning the ownership of the intangible.

Appellees seek to explain *New York Life Ins. Co.* v. *Dunlevy,* 241 U.S. 518, as an attempt to convert *in personam* liability into *quasi in rem* liability. We have never heard the terms, *in personam* and *quasi in rem,* applied to liabilities before, but only to jurisdiction and therefore have difficulty in comprehending the distinction appellees seek to make.

The debtor in *Dunlevy* had no interest in who the proper payee was. It acknowledged its debt and was willing to pay. It interpleaded in the state in which the policy was issued, in which both rival claimants had lived and in which another phase of the litigation had begun with personal service on both rival claimants. Nevertheless, it was held that in order for the court to have jurisdiction, there had to be personal service on both rival claimants. This was so (1) because the debt was an intangible which did not become converted into a segregated fund or tangible by the payment into court of a sum equal to the debt; and (2)

because an attempt to litigate rival claims to an intangible requires the determination of personal rights, i.e., the absentee has something to litigate with respect to its ownership.

Bank of Jasper v. *First Nat. Bank*, 258 U.S. 112, is restricted by appellees to one of its alternative grounds of decision. They ignore entirely the other alternative ground for holding that no *in rem* jurisdiction existed, (Federation Juris. Stat., p. 13) namely that the state court lacked jurisdiction because plaintiffs did not claim that the bank deposit belonged to the absent claimant and thereby seek to have it applied to their claims against the absentee but, instead, claimed that the bank deposits belonged to plaintiffs. Thus, they had set up a rival claim to intangibles.

In both the *Dunlevy* and in the *Bank of Jasper* cases, this Court distinguished the garnishment and attachment case (*Pennington* v. *Fourth Nat. Bank;* supra; *Chicago R.R.* v. *Sturm;* supra; *Harris* v. *Balk,* supra) on the ground that they did not involve rival claims to intangibles whereas the situations in *Dunlevy* and in *Bank of Jasper* did. Appellees blithely ignore these explicit distinctions made by this Court and offer, in their place, obscure and untenable rationalizations.

Appellees also rely upon state court cases cited by the California Supreme Court in its opinion. Of the cases alleged to support the conclusion reached by that Court, only three either deal with the constitutional issue or so much as cite a case dealing with that issue.

Cameron v. *Penn. Mut. Life Ins. Co.,* 161 Atl. 55 (N. J.) premised jurisdiction on control over a tangible chose, the written policy contract, in an action

for reformation. That Court denied, moreover, that there could be *in rem* jurisdiction with respect to rival claims to an intangible. In *Perry* v. *Young*, 182 S.W. 577 (Tenn.) the court also predicated jurisdiction upon an insurance policy as a tangible chose. The third case, *Mutual Home Ass'n.* v. *Zenatchka*, 297 S.W. 317 (Tex. Civ. App.) dealt with a segregated fund and not with an intangible.

In *Omaha Nat. Bank* v. *Federal Reserve Bank*, 26 F. 2d 884, cited by appellees, the Court held that specific monies deposited in one account in which no transactions took place constituted specific personal property over which *in rem* jurisdiction could be exercised. Similarly, *Feuchtwanger* v. *Central Hanover Bank*, 288 N.Y. 342, held that notes wrongfully deposited in an account which never fell below the amount of those notes constituted "specific personal property" so as to permit in rem jurisdiction. It is of no consequence here whether those courts were correct in assimilating the bank accounts there involved to tangibles. The fact remains that neither court purported to rule that *in rem* jurisdiction could be exercised with respect to rival claims to bare intangibles.

Nor does *Thompson* v. *Terminal Shares*, 89 F. 2d 652, do so. That case involved the foreclosure of a lien on stock certificates which were held to be a tangible *res*.

We are aware of no state case, other than the judgments here appealed from, which has held that a state may constitutionally assert *in rem* jurisdiction over rival claims to an intangible.

III

APPELLANTS HAVE STANDING TO RAISE THE CONSTITUTIONAL ISSUE WITH RESPECT TO JURISDICTION

If the California court may not constitutionally exert jurisdiction over the actions here involved, then clearly appellants, as defendants in those actions, have standing to assert that lack of jurisdiction because the Court would then have no jurisdiction in those actions over them, as well. See *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, in which Consolidated Edison attacked the jurisdiction of the Board over the proceeding because of the absence of an indispensable party.

Since the plaintiffs seek to invalidate the provisions in the trust agreements providing for payments to the Trustee and also those in the Federation agreement providing for payments to him, the litigations seek to deprive the Trustee of his property. He is therefore an indispensable party to the suits. As this Court held in *Mallow* v. *Hinde,* 12 Wheat. 194, 198:

> "No court can adjudicate directly upon a person's right without the party being actually or constructively before the court."

And in *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, at 233, this Court held that

> "We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. (citations) The rule, which was applied in the cases cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here."

It will be noted that in these cases the court did not talk of parties to contracts but of "rights" and "valuable and beneficial interests." Certainly, the Trustee to whom the payments were due under the contracts, had "rights" and "valuable and beneficial interests."

The New York cases cited by appellees are not to the contrary. *Alexander* v. *Equitable Life Ass. Soc.*, 233 N.Y. 300, and *Gennett* v. *Smith*, 244 App. Div. 3, 278 N.Y.S. 478, hold only that where a party to a contract obligates himself to a specified performance and requires that his contractual benefits be furnished to a third person, that third person may not insist upon performance in his favor where the party to the contract has not performed his obligations under the contract. The cases do not hold, however, that the third person beneficiary is not entitled to be served and heard in any action litigating the question of performance under the contract, and it is in support of this proposition that appellees cite these cases.

Appellees also engage in the circular reasoning that, if the Federation has breached their rights, the Federation may not insist that the Trustee be a party to the adjudication. The rule is, however, as we have shown above, that the court lacks jurisdiction to determine whether a breach occurred unless it first has the indispensable parties before it. Appellees lift themselves by their bootstraps by first assuming the breach, which is the ultimate conclusion sought in the litigation, and then arguing that the court can decide that a breach exists in the absence of an indispensable party because the breach has been assumed to start with.

Nor is there validity to the assertion that the Federation cannot complain because it is not enjoined and

its property is not being taken. The question here is one of jurisdiction. If the court lacks jurisdiction over any indispensable party, it lacks jurisdiction over the action and each defendant has standing to contest jurisdiction over the action, as we have pointed out above.

CONCLUSION

The motion to dismiss the appeals or to affirm the judgments should be denied and probable jurisdiction noted.

Respectfully submitted,

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